KNOW YOUR CONSTITUTION

A Handbook to the South African Constitution

WE THE PEOPLE SOUTH AFRICA

+SECTION27

PURPOSE AND STRUCTURE OF THIS BOOK

The Constitution is a document that we all own. The purpose of this book is to help you know what the Constitution says, understand how the different parts of the Constitution work and what power it makes available to the people of South Africa. We aim to bring the Constitution to life through people's stories and experiences.

The book is set out in five sections:

01 The first section – **the Introduction** – explains how the Constitution and its vision for South Africa promote democratic values, **social justice**, and the advancement of fundamental human rights and freedoms. It explains what the Constitution is, its history, and **founding values**. It also explains what human rights are, focusing on two fundamental rights: the right to **dignity**, and the right to **equality**.

02 The second section – **Open and Democratic Society** – talks about **participatory democracy** where the people govern. This section also looks at some important rights for our participatory democracy.

03 The third section – **Socio-Economic Rights** – talks about your right to resources like housing, food and water, and how important this is for social justice.

04 The fourth section – **How Government Work?** – is about the way that the Constitution requires that our government works.

05 The fifth section – **Activating Rights** – gives you some important contact organisations if you want to access a right, or think a right has been violated.

In each section, we have explanations of the law. Learning about the Constitution happens in many ways, and so we also use case studies, snapshots of rights in action, flashbacks to our history, and FundZa stories written about fundamental rights.

We hope to encourage you as readers to take ownership of the Constitution yourselves and bring it to life through your own experiences, identities and backgrounds.

This book has been a labour of love. It started being written in 2015 and was updated in 2025. Many people contributed to the book from a range of organisations.

We would particularly like to thank the 2015 drafters of this handbook, including: Tim Fish Hodgson, Rachel Mazower, Meghan Finn and Isabeau Steytler, who were grateful for input from Kayum Ahmed, Kisha Candasamy and Mateenah Hunter-Parsonage, Mzamo Zondi, Anele Yawa, Robyn Hugo, Thembi Luckett, Ben Winks, Demelza Bush, Sam Waterhouse, Irene De Vos, Liesl Muller, Anjuli Maistry and David Bilchitz.

The 2025 team has included the following people from SECTION27: Zeenat Sujee, Faatima Laher, Benni Mudau, Emihle Majikija, Khuselwa Dyantyi, Nomzamo Ngcobo, Jonathan West, Tendai Mafuma, Teri Brown, Tsadok Yehudah and Sasha Stevenson; the following people from WeThePeopleSA: Mbali Baduza, Sandra Mujeni, Fani Miya and Kerry Skinner; and the following people from the University of Pennsylvania Black Law Students Association, who visited South Africa in March 2025 and had a crash course in South African constitutional law and culture: Beverly Danquah, Ambar Larancuent, David Johnson, Jamila Bakhit, Ashonti Farrior, Briana Johnson, David Alan Johnson, Ethan A. Burrell, Jacqueline Boone, Jordan Lassiter, Kanyinsola Oye, Nigel Davis and Shira Nash.

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INTRODUCTION

01

INTRODUCTION

Democratic Values, Social Justice and Fundamental Human Rights

The **Constitution** envisages a society that is committed to democratic values, **social justice** and fundamental human rights. For centuries, South Africa was governed by the oppressive systems of **colonialism** and **apartheid**. The majority of our population was disenfranchised and disempowered. In the 1990s, South Africa went through radical changes, replacing the system of apartheid with constitutional democracy.

The Constitution is the highest law of the country. No law may contradict or be in conflict with it. The Constitution contains the **Bill of Rights**, which enshrines the fundamental human rights of all those in the country. It also sets out how the government works, and the values of **participatory democracy**, **accountability,** and openness.

But the Constitution is more than a dry legal document. And its work is not complete. Instead, it is a vision of what our society could be. Its preamble says:

> We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> >
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> >
> > Improve the quality of life of all citizens and free the potential of every person; and

> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> **May God protect our people.**
>
> **Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.**
>
> **God seen Suid-Afrika. God bless South Africa.**
>
> **Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.**

The Constitution's vision is grounded in the present reality faced by many people living in South Africa. This is made clear as early as its second line, which acknowledges that South Africa's **colonial** and **apartheid** past created an unjust and unequal society where the wealth, resources and status people have are based on things like race, **gender** and class. The **Constitution** rejects this society and seeks to change it. Most important for the focus of this book is that the Constitution does this by saying that we need a society based on democratic values, fundamental **rights** and social **justice**. These goals are at the core of the whole Constitution.

No one and no action is above the standards the Constitution sets out. Everyone – whether a person, company or **government** institution – has to act according to the Constitution, including the president, government ministers, members of **Parliament** and judges. Any laws created by Parliament, or policies developed by government ministers, must also fit with the values, rights and rules of the Constitution.

As the people of South Africa have shown in the first 30+ years of our **democracy**, the Constitution is more powerful than any ordinary law. It is not just a rulebook that tells people and government what we can and cannot do. It also gives us an idea about what kind of country South Africa should be and how to go about transforming our society to make that vision a reality.

The Constitution is everywhere. The constitutional project should transform all aspects of life in South Africa: from the corridors in government institutions to the halls of schools and the waiting rooms in clinics, from our interactions with our employers to relationships within our homes. To achieve this aim, the Constitution entrenches respect for **human dignity**, the achievement of **equality** and the advancement of human rights and **freedoms** as core **founding values**.

Placing these values at the centre of our society means that in our country poverty and inequality cannot be tolerated. It also means that we have all committed to live in a country in which we constantly work towards improving the living conditions and freeing the potential of each and every person.

So many people in South Africa presently face a reality very different to this one. Our society is still crippled by inequality and injustice, by racism and sexism, by vast amounts of resources concentrated in the hands of few. The Constitution by itself cannot change these things. What it can and does do is set out a political, economic and legal roadmap for a society that is different, and better, than our present reality.

On a more personal level, the Constitution means that people must be treated with respect, care and concern. By recognising the importance of human **dignity**, the Constitution asks us to try to acknowledge and empathise with each other's daily struggles and commits us to working together to improve all of our lives. This way of living is well understood by most South Africans and finds meaning in the principle of **Ubuntu** in African moral philosophy.

To sum up, the Constitution is a transformative document that aims to transform our entire country. It is a commitment to the idea that, conscious of our history, we and the government that we choose will work tirelessly for social justice. The Constitution also commits each of us to contributing towards its vision. As we will see, this makes perfect sense, since the people of South Africa were involved in the process of drafting the Constitution every step of the way.

WHERE DOES THE CONSTITUTION COME FROM?

The 1994 general elections were a historic moment in South Africa. Since at least 1652, South African has had a history of white-minority rule where the black majority was discriminated against in various ways such as excluding them from participating in governance, restricting their access to resources and preventing them from fairly participating in and equally enjoying public life in South Africa.

The 1994 general elections were the first legitimately held democratic elections where absolutely any adult could cast their vote for who they wanted to represent them regardless of the voters' and candidates' race, creed, or social standing. Black people were thus able to vote for the first time, be included in decision-making processes and run for election. Through the candidates that formed part of different political parties in the 1994 general elections, the people of South Africa voted for 490 diverse individuals to represent their voices in Parliament and in the text of the Final Constitution – the People's Constitution. This Parliament had representatives of all races, all genders and people from all walks of life. Some had been part of the previous governance structures and thus had experience, whilst others were ordinary citizens who were going to experience governance for the first time.

The 1994 general elections resulted in the formation of the two houses of that Parliament, the National Assembly and the Senate, which was governed by the 1993 Interim Constitution. The 490-member Parliament formed the Constitutional Assembly on 09 May 1994 through a joint sitting in terms of section 68(1) of the 1993 Interim Constitution: 400 members from the National Assembly (elected by proportional representation using national and provincial candidate lists) and 90 members from the Senate (which consisted of 10 members from each of the nine Provinces).

Directed by the 1993 Interim Constitution, the Constitutional Assembly worked with an urgent mandate to complete drafting the Final Constitution within two years. Cyril Ramaphosa of the African National Congress was elected as Chairperson; and Leon Wessels of the National Party (the final ruling party of the apartheid government) was elected as Deputy Chairperson of the Constitutional Assembly. The rest of the Constitutional Assembly members were a combination of people who had been a part of the constitution-making processes at the Convention for a Democratic South Africa (CODESA), the Multi-Party Negotiation Forum and lay-people who were ordinary members of society that had no constitution-making background.

From the time of their appointment, the work of the Constitutional Assembly involved several parts: consulting the public; processing of public submissions; parliamentary debates on issues; legal team consultations; technical drafting of constitutional clauses; translation of the text to plain language; interpretation of drafted text in 11 languages; and sharing the first draft of the Constitution with the public for review before its finalisation.

The Constitutional Assembly decided from the outset that the process that produces the new Constitution (i.e. the Final Constitution) must be a people-driven process. Their first decision was to ensure that all its work, meetings, discussions, and negotiations would be conducted openly and transparently, with the public fully involved. To encourage participation, members were allowed to speak in any South African language. The guiding motto was: “Nothing above the heads or behind the backs of the people.” To this end, the assembly embarked on what is still our country’s largest and most comprehensive ever public participation campaign in order to give the greatest possible number of South Africans the opportunity to directly participate in the constitution-making process. The Public Participation Programme was officially launched at the end of 1994 to open-up public submissions and start the Constitutional Public Meetings, which were face-to-face meetings where the general public had direct access to their elected representatives.

The Constitutional Assembly travelled throughout the country in order to hear from diverse groups of South Africans. To reach remote areas, the Constitutional Assembly travelled nationwide using planes of the South African Defence Force (SADF) to make sure they raised awareness of the

Constitution writing process and to ensure that they got diverse views from the people of South Africa. It held public consultations with various groups of people, including:

- residents of informal settlement;
- persons with disabilities;
- traditional leaders;
- diverse religious groups; and
- political parties.

There were critics and sceptics that thought that the entire constitution-making process was flawed and would take too long to ultimately conclude. Nonetheless, the Constitutional Assembly followed extensive democratic consultation processes, until the eventual finalisation of the Final Constitution. However, even after this, any draft of the Final Constitution produced by the Constitutional Assembly had to comply with 34 principles that were contained in the 1993 Interim Constitution before it could become the official supreme law. Only the Constitutional Court could certify and confirm whether any draft produced by the Constitutional Assembly fully complied with the 34 constitutional principles.

The 1993 Interim Constitution required the Final Constitution to be drafted in a process that:

- was transparent, open and credible;
- allowed inclusivity in the process;
- had a role for political parties and civil society;
- had participatory democracy; and
- produced a final product that enjoyed legitimacy.

As a result, the Constitutional Assembly created two major structures as its administrative arms: the Community Liaison and Media Liaison departments. These two departments were tasked with giving effect to the Public Participation Programme throughout the country. The two departments were backed by a massive staff contingent armed with diverse skills. A significant budget was allocated to the entire campaign – the Media Liaison department alone had R35-million to spend in about 18 months of the process.

The Community Liaison department was tasked with implementing the face-to-face outreach component of the Public Participation Programme. It had two phases: the pre-draft phase (January – October 1995) and the draft phase (November 1995 – March 1996). In order to give effect to the Community Liaison department's task, the following communication mechanisms were established:

- Provincial Government Liaison.
- Constitutional Public Meetings.
- National Sector Hearings.
- Constitutional Education Programme.
- Civil Society Database.

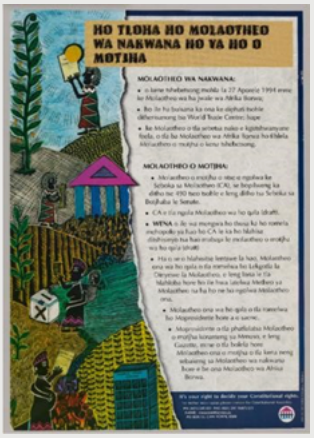
Extensive interaction in this context took place throughout the country, with members of the Constitutional Assembly taking part in leading the discussions. The general response from members of the public and organised formations was positive and welcoming to the idea of the two departments' taskforce interacting with them. The Community Liaison department's drive resulted in almost 1 200 000 people taking part in Constitutional Public Meetings, 1 253 events with various organised formations, regular interaction with 1 588 organisations and 1 259 Constitution Education Programmes.

There was a deliberate effort to use any possible media channel to reach as wide an audience as possible, particularly in rural and under-served areas.

The media campaign was crucial in galvanising public interest after the fatigue of four years of political negotiations and the 1994 general elections campaigning. The media campaign drove messages through adverts and other media materials, including:

- 'You have made your mark, now have your say!'
- 'Building the Cornerstone of the Nation'
- 'It's your right to decide your constitutional rights!'
- 'Securing your right, securing your future!'
- 'One law for one nation!'

Source: WeThePeopleSA, ZA CHT CA-8-1 Archive of the Constitutional Assembly, Media, Posters. https://archive.wethepeoplesa.org/index.php/posters-2



Source: WeThePeopleSA, ZA CHT SSPP Shalala and Skjelten Collection - Public Participation. https://archive.wethepeoplesa.org/index.php/shalala-and-skjelten-collection-public-participation-3

The various media campaigns achieved the following:

- 10.4 million listeners reached on SABC radio.
- 25 town hall talk-format programmes on SABC TV.
- 160 000 copies of the Constitutional Talk newsletter distributed nationally in taxi ranks and by post every month.
- Over 1 million copies of comic strips produced and inserted in several newspapers.

A survey in the early days of the campaign during 1995, with only 3 months in, already revealed that:

- 65% of the South African population had been reached;
- two-thirds of those reached felt they had learnt something from the adverts and other media they had seen;
- 14% of those reached had contacted the Constitutional Assembly as a result of the campaign;
- people were sceptical about the Public Participation Programme, wondering whether their views would truly be taken into account; and
- a large number of people needed more information and education about the constitution-making process.

In the second phase of the media campaign, after the adoption of the first draft Constitution, a survey showed improved results:

- 73% of the population (18.5 million people at the time) had learned about the process from the media.

- 87% of the population had read the draft Constitution.
- Only 7% of the population expressed no interest in the process.

The extensive public consultative process followed by the Constitutional Assembly inspired the insertion of section 59 of the Final Constitution, which requires widespread public access to and extensive public consultation during the legislative process. The first draft of the Final Constitution was finalised on 08 May 1996 and had to be filed with the Constitutional Court to confirm that the draft complied with all 34 of the constitutional principles.

In a judgment handed down on 06 September 1996 in the matter of Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26, the Constitutional Court refused to certify the first draft since it did not fully comply with all 34 constitutional principles. The Constitutional Assembly had to reconvene and adopt an amended, second draft. It did so on 11 October 1997.

On 04 December 1996, the Constitutional Court confirmed the validity of the second draft in the matter of Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 24, in that the second draft complied with all the 34 constitutional principles. The Final Constitution was ultimately finalised and assented to (i.e. signed and became law after it was recorded into South Africa's statute book) by former President Nelson Mandela on 10 December 1996, but it only commenced (i.e. became legally operational and enforceable) on 04 February 1997.

The Final Constitution is regarded as both a democratic and living document: this means that it is a product of the will of the majority of the people of South Africa during the Public Participation Programme. This programme managed to reach across South Africa in the locations people lived in, in the languages they spoke, and the type of communication preferred. Those without access to televisions were still reached in their languages via radio shows, newsletters, comic strips and pamphlets at taxi ranks, microphone announcements and face to face consultations with the public in their communities. The Constitution is not a static document that is averse to change – which means that people today can still engage in democratic processes to amend it and raise their opinions about it. To date, the Final Constitution has been amended 18 times but has impressively kept its essential character in respect of the 34 constitutional principles. 2025 brings the final Constitution to 29 years of existence.

The Constitutional Assembly deliberately drew upon a wealth of international human rights instruments. This was a deliberate and crucial choice, South Africa was emerging from a period of international isolation and condemnation due to Apartheid. Adopting a Constitution that adhered to internationally recognised human rights standards was crucial for gaining legitimacy on the global

stage. In 1948, the same year that **apartheid** began, the United Nations adopted the Universal Declaration of Human Rights, the first worldwide document that expressed fundamental rights that everyone has. Many other international documents have been created and signed to protect and set standards for fundamental rights, including the Convention on the Rights of the Child, and the International Covenant on Economic, Social and Cultural Rights. The Convention on the Rights of the Child (CRC), which sets out the civil, political, economic, social, and cultural rights of every child, emphasises the best interests of the child as a primary consideration in all actions concerning children. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which protects rights related to work, social security, health, education, and an adequate standard of living, recognises that these rights are essential for human dignity and well-being.

On our own continent, the African Charter on Human and Peoples' Rights (ACHPR) is a regional human rights treaty that aims to promote and protect human rights and fundamental freedoms across the African continent. It includes both individual rights and collective rights, such as the right to self-determination and the right to development. These international documents have played a crucial role in shaping South Africa's constitutional framework. Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996, explicitly states that when interpreting the Bill of Rights, Courts must consider international law. This provision has enabled South African Courts to draw on international human rights norms to give greater substance and meaning to the rights enshrined in the Constitution. In the *S v Makwanyane* and Another (1995) case, the Constitutional Court's first judgment, it held that the death penalty was unconstitutional, relying heavily on the right to life as recognised in international human rights law. The court emphasised that South Africa's human rights framework should be interpreted in line with international norms.

But, importantly, our Constitution does not only draw on international documents. It has deep roots in our own history. On 26 June 1955, almost a decade into the apartheid era, 3,000 people from all over the country met in Kliptown, Soweto. Calling themselves the Congress of the People, their purpose was to decide on the values of the anti-apartheid struggle and the future society they wanted to create. The gathering brought together people of all races and cultures, something that was revolutionary at the time. Though from different backgrounds, the Congress of the People was united by a common aim: creating a free, equal and democratic South Africa for all. Before the meeting, volunteers (called Freedom Volunteers) travelled all over the country to hear which values people wanted South Africa to stand for.

These ideas were put together in a document called the Freedom Charter. Each section of the Charter was read out to the people and voted on. The Constitutional Assembly, which was tasked

with drafting the final Constitution in the mid-1990s, operated within this rich historical context, acknowledging the profound impact of the Freedom Charter as a key expression of the aspirations of the majority of South Africans for a just and equitable society.

The Freedom Charter was an important tool that anti-apartheid movements rallied around from 1955 until the end of apartheid. It was South Africa's first clear manifesto committing to a society grounded in social justice. The Freedom Charter is important when understanding where the Constitution comes from and what it seeks to achieve. When it was time to write our Constitution, the values and principles set out in the Freedom Charter were still relevant to what South Africans wanted, almost 40 years later. It is no surprise then that the political demands in the Freedom Charter form the core of our Constitution.

> **We, the People of South Africa, declare for all our country and the world to know:** that South Africa belongs to all who live in it, black and white, and that no **government** can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief; And therefore, we, the people of South Africa, black and white together equals, countrymen and brothers adopt this Freedom Charter; And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won.
>
> **The People Shall Govern!** Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws; All people shall be entitled to take part in the administration of the country; The rights of the people shall be the same, regardless of race, colour or sex; All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.
>
> **All National Groups Shall have Equal Rights!** There shall be equal status in the bodies of state, in the Courts and in the schools for all national groups and races; All people shall have equal right to use their own languages, and to develop their own folk culture and customs; All national groups shall be protected by law

against insults to their race and national pride; The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime; All apartheid laws and practices shall be set aside.

The People Shall Share in the Country's Wealth! The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the wellbeing of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

The Land Shall be Shared Among Those Who Work It! Restrictions of land ownership on a racial basis shall be ended, and all the land redivided amongst those who work it to banish famine and land hunger; The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers; Freedom of movement shall be guaranteed to all who work on the land; All shall have the right to occupy land wherever they choose; People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

All Shall be Equal Before the Law! No-one shall be imprisoned, deported or restricted without a fair trial; No-one shall be condemned by the order of any Government official; The Courts shall be representative of all the people; Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance; The police force and army shall be open to all on an equal basis and shall be the helpers and protectors of the people; All laws which discriminate on grounds of race, colour or belief shall be repealed.

All Shall Enjoy Equal Human Rights! The law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children; The privacy of the house from police raids shall be protected by law; All shall be free to travel without restriction from countryside to town, from province to province, and from South Africa abroad; Pass Laws, permits and all other laws restricting these freedoms shall be abolished.

There Shall be Work and Security! All who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers;

The state shall recognise the right and duty of all to work, and to draw full unemployment benefits; Men and women of all races shall receive equal pay for equal work; There shall be a forty-hour working week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers; Miners, domestic workers, farm workers and civil servants shall have the same rights as all others who work; Child labour, compound labour, the tot system and contract labour shall be abolished.

The Doors of Learning and Culture Shall be Opened! The government shall discover, develop and encourage national talent for the enhancement of our cultural life; All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands; The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace; Education shall be free, compulsory, universal and equal for all children; Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit; Adult illiteracy shall be ended by a mass state education plan; Teachers shall have all the rights of other citizens; The colour bar in cultural life, in sport and in education shall be abolished.

There Shall be Houses, Security and Comfort! All people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security; Unused housing space to be made available to the people; Rent and prices shall be lowered, food plentiful and no-one shall go hungry; A preventive health scheme shall be run by the state; Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children; Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, creches and social centres; The aged, the orphans, the disabled and the sick shall be cared for by the state; Rest, leisure and recreation shall be the right of all: Fenced locations and ghettoes shall be abolished, and laws which break up families shall be repealed.

There Shall be Peace and Friendship! South Africa shall be a fully independent state which respects the rights and sovereignty peace and the settlement of all international disputes by negotiation — not war; Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and

status of all; The people of the protectorates Basutoland, Bechuanaland and Swaziland shall be free to decide for themselves their own future; The right of all peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close cooperation. Let all people who love their people and their country now say, as we say here: These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty

FOUNDING VALUES

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Before we discuss our rights, one at a time, it is important to understand what binds them all together. The Constitution sets two rights – the rights to human **dignity** and **equality** – apart from all of the other rights by listing them not only as rights but also as **founding values** of our **democracy**. These founding values are the glue that sticks our rights together and keeps them in line with what the Constitution aims to achieve: a better life for all.

Achievement of Equality – Equal Protection and Enjoyment of All Rights

Equality is given a central role in our Constitution – it is a founding value, and a fundamental right. Equality is a central part of social justice. So long as our society continues to be terribly unequal, it cannot be truly just.

A reason that **equality** is central to our **Constitution** is because one of the biggest problems in our country is continued inequality between races, sexes, genders and classes. Deep inequalities were created by our **colonial** and **apartheid** past in which white people, and men in particular, were favoured and advantaged by many laws and throughout our society. Today, South Africa is one of the most unequal societies in the world.

The Constitution aims to change this. It is concerned with how inequality affects many rights, because the achievement of rights is often dependent on access to resources and opportunities. It especially impacts on **socio-economic rights**, which require money to be **realised**. (You can read more about how inequality is connected to socio-economic rights in the introduction to Section 3 on p. 105)

Human Dignity – Ensuring That All People in South Africa Are Treated With Care, Concern and Respect

Dignity is core to the Bill of Rights. To say that everyone has inherent dignity means that each person is valuable, and has worth. During **apartheid** the law in general, and government officials in particular, came to be feared by the large majority of South Africans. This is because the law treated most South Africans in an uncaring, cruel way that did not respect their value as human beings. To make sure that this changes in the new South Africa, the Constitution places respect for dignity not only as a right but also as a founding value.

Dignity is the value that you have because you are an individual, with your own independent life to lead. Having each and every one of your rights respected, protected, promoted and fulfilled by the government and those around you is what allows us to feel and properly **realise** that value. This value also explains why the Constitution places a strong emphasis on basic services. Without access to food, water, shelter and education it is difficult for people to live dignified lives and make their own independent life decisions. For instance, if you are evicted from your home and you have nowhere else to live, you will also have nowhere to go to the toilet, nowhere to cook and nowhere to sleep. These are not conditions that allow you to live with **dignity**, in a way that recognises your inherent value.

Dignity also links very strongly to **Ubuntu**. Ubuntu is the idea that part of being human is your connection to other people. The **interim Constitution** included Ubuntu as a value. The Constitutional Court has often highlighted the importance of Ubuntu as a part of the Constitution's values and our understanding of democracy in South Africa. It captures the idea that "we are not islands to ourselves", that to respect my own humanity also requires me to respect the humanity of all others.

More than a political theory, Ubuntu is also a moral code for many South Africans.

This philosophy is expressed by Nguni language speakers in the phrase *"Umuntu, ngumuntu, ngabantu"* and Sotho-Tswana speakers as *"Motho ke motho ka batho babang"*. These have been loosely translated to mean that "a person is a person through other people". It is also similar to the concept of *"menswaardigheid"* in Afrikaans. Our understanding of human dignity – informed by Ubuntu – will often mean that Courts will require that the government and businesses empathise, sympathise and respect those with whom they interact, particularly if they are in a position of greater power.

Advancement of Human Rights and Freedoms

One of the values of our Constitution is the advancement of human rights and freedoms. This means that our society is based on the progress and development of human rights and human freedoms in everything that we do. All actions taken by the **government** must also advance human rights and freedoms.

Along with dignity and equality, the value of freedom is important in our Constitution. Like those two values, freedom is important for our current constitutional **democracy** exactly because most South Africans were deprived of freedom for so long and were not able to determine the paths of their own lives.

Freedom does not just mean the absence of restrictions or interference. Freedom also means that you are able to choose how you want to lead your life, and what values you, as an individual, want to be central to your life. In this way, freedom is also closely linked with dignity. Because you have inherent worth, you rather than anyone else (including the government) should have the power and the **autonomy** to carve out your own identity and to seek your own fulfilment.

There is no independent right to freedom in itself. However, freedom as a value is linked to a number of rights that protect certain kinds of freedoms. These include freedom and security of the person – the right to be free from violence from the state and from other people, and the right to make choices about your body and freedom over important decisions about your identity (such as your freedom of religion, belief and opinion, your freedom of association and even your freedom of trade and occupation).

The advancement of freedoms is also impacted on by other rights. Without important **socio-economic rights**, for example, you are not able to fully exercise your freedom, and are restricted

in the choices you make about your life. In some ways, it does not make sense to even talk about freedom in the absence of certain important basic standards of living. So, when your rights to food, healthcare and housing are protected, the value of freedom is also advanced. Similarly, freedom with poverty and without equality is a very limited form of freedom. Political freedoms without freedom from poverty and inequality will not do justice to the Constitution's vision.

Other Founding Values – Keeping Government on Track

Human **dignity**, the achievement of equality, and the advancement of human rights and freedoms are only some of our **founding values**. Section 1 of the **Constitution** also recognises that our society is founded on **non-racialism** and **non-sexism**. It says that we must have a **multi-party democracy**, because that is most likely to give us a **government** that is accountable, open and responsive. Our government must set out to advance all human rights and freedoms. These values not only tell us what the government must aim to achieve, but also how government must do so.

As you read through the next few sections on rights, think about how each right is connected to our founding values and the society that it describes.

WHAT USE IS THE CONSTITUTION TO ME?

More than thirty years after the adoption of the Constitution, on 8 May 1996, we have much to be proud of as a young democracy. However, South Africa still does not look the way the Constitution says it should.

The Constitution grants us many rights. Nonetheless a large proportion of people living in South Africa are denied these on a daily basis. We have a right to quality education and, although most children do go to school, they often go to schools which have no chairs to sit on, no textbooks to read and no safe or clean toilets to use.

Despite a right of access to adequate housing, many people are homeless, and still more live in intolerable, unsafe and unhealthy conditions.

Though women have a right to **equality, domestic violence, sexual harassment** and **rape** are daily experiences for many women, and these are real and ever-present threats for all women.

Now more than ever it is vital that we, as the people of South Africa, take ownership of the Constitution and make it work. As long as there is widespread inequality and poverty, our Constitution's promises

have a hollow ring.

The first step to tackling these problems is knowing and understanding what our Constitution promises. Unfortunately, very few people have ever read or been taught about the Constitution and others do not even know it exists. It is only if we know what the **Constitution** says about our rights, that we can decide whether the **government** is doing enough to make them a reality and whether our families, employers, colleagues, businesses and other people are violating them.

What Are Human Rights?

One of the main purposes of a constitution is that it expresses how we as a country aspire to live our lives. It puts in writing what we as a society think everyone is **entitled** to.

The Constitution refers to these entitlements as human rights and lists them in the second chapter of the Constitution called the **"Bill of Rights".** Our Constitution recognises a lot of rights – far more than most constitutions in the world! Although many rights like the right to vote or the right to life might seem obvious, there are rights and things to know about your rights, which are more complicated.

Before we go on to discuss the specific rights the Constitution gives us, there are a few general things that we should understand about rights:

01 **Everyone has rights!** Almost all of the rights in the Constitution are made available to "everyone" with no exceptions. This means that you are entitled to the **Constitution's** rights, for example, whether you're a man or a woman, a child or an adult, if you're in prison and even if you're a foreign national. There are some rights that are not available to everyone: for example, in order to vote in elections, you must be a citizen of South Africa, and you must be an adult. However, the fundamental rights of **dignity** and **equality**, the core **socio-economic rights** to education, food, water, healthcare, social grants and housing are owed to everyone.

02 **Rights are free, and cannot be earned!** The Constitution proclaims that we have these rights for free. You do not have to earn your rights by behaving in a certain way. For example, while it is good for school children to study hard and gain knowledge, even if they do not, they still have a right to an education. This is important to understand.

Though we are responsible for respecting our own and other people's rights, we do not enjoy rights only if we act responsibly. The rights in the Constitution protect even people who make reckless, irresponsible or bad life choices.

03 **Rights work together!** Just like we have many different parts of our body, which work together to allow us to walk, eat and think, we have many rights that work together to make up our entitlements. It is not good enough that we are given some of our rights and not others – we are entitled to them all. For example, what use is it to have the right to life if we cannot gain access to life-saving medical treatment to keep us alive (which is part of the right to access healthcare services)? We are not entitled only to some of our rights some of the time; we are entitled to all of our rights all of the time. However, this does not mean that rights are absolute. Rights can be lawfully limited, as we discuss on p. 21.

04 **The government has a duty to help make our rights real!** The Constitution says that all parts of our government must "**respect, protect, promote and fulfil**" the rights in the Bill of Rights. *Respecting* our rights means that all government officials, whether teachers, nurses, police, administrators and even Ministers cannot violate our rights. *Protecting* our rights means that all parts of the government must take steps to make sure that no one – whether a business, a boss or a family member – violates our rights. *Promoting* our rights means that the government must in all its actions – both within our country and outside of it – show that it proudly values and embodies our rights. It also means that the government must make sure that people understand and know their rights. Finally, *fulfilling* our rights requires the government to take proactive steps to make all of our rights real to a wider range of people over time. *The government is legally obliged by the Constitution to fulfill all of these duties.*

05 **Other people have duties to help make our rights real!** The Constitution does not only impose **obligations** on our government to protect our rights. It also places duties on other people and on companies to work to make our rights real. Sometimes, these duties are duties not to interfere with others' rights. For example, you have the right to privacy. This means that the **government** cannot search your home without a warrant, or good reason for doing so. But it also means that any other person also has a duty not to invade your privacy. The duties that other people bear can also include duties actively to help realise

your rights. For example, the right to equality requires some businesses to make sure that they hire employees who are black, or female. Although the government bears more duties to respect, protect, promote and fulfil fundamental rights, individual people bear some of these duties too.

06 **Rights are legally enforceable!** We can go to court if anyone, whether a part of the government, a family member or a business violates our rights. The Courts are the "guardians of our rights" and must put an end to any violations of our rights that we bring to their attention in the appropriate way. Throughout this handbook we will explain different ways of activating our rights without going to court. Ultimately, you also have a right to go to court to protect your rights if no other method works.

When reading through the rights in the **Bill of Rights** and the explanations you might find that you lack something that a particular right promises. For example, you might not have access to clean water, even though our Bill of Rights promises everyone a right to have access to sufficient water. This does not mean that you do not have that right. It means that your right is not being made available to you or "**realised**". A right is realised when you have the benefits that the right promises. When the **government** builds a pipeline so that you can have a tap in your house, you have access to water and your right is realised. If you have enough money to move into a house with running water and pay for it, then your right has also been realised. If you do not have enough money to pay for water, the government has a duty to provide access to water to you for free. The same is true of other basic services such as electricity, toilets, housing and education, as we discuss later in this handbook.

Socio-Economic Rights: Making Basic Services Available to More People over Time

The preamble to the **Constitution** articulates a vision of a society based on **social justice**. Unlike many other countries, the South African Constitution provides for legally enforceable **socio-economic rights**. These are rights about material things, for example access to food and housing. So far we have referred to these as basic services. Socio-economic rights must be understood along with the other rights in the Constitution – they are closely connected to these rights, because realising socio-economic rights enables everyone to enjoy the other rights in the Bill of Rights, and advances dignity and **equality**. It is by realising these rights that our society can become a more just one.

All of the same rules that we have already discussed apply to these rights. However, because first, they are so central to the Constitution's **founding values** of achieving **equality**, respecting human **dignity** and building a society based on **social justice**, and because second, these rights require extensive resources to be realised, the Constitution highlights the specific **obligations** of the **government** in terms of these rights. We discuss **socio-economic rights** in section three of this handbook on p. 103.

Get Up, Stand Up For Your Rights!

The Constitution cannot be taught to us in the same way as a simple maths problem. Although the framework of the Constitution can be explained, many of the principles, values and rights set out in the Constitution require our own perspectives, understandings and interpretations. People will sometimes disagree on the meaning of a right and what difference it makes in a particular circumstance. Knowing what the Constitution says helps us think about and decide what our rights mean.

The Constitution may give us many rights, but it says very little about each one. Take, for example, the right to basic education in section 29 of the Constitution. Nowhere in this section or anywhere else in the Constitution are teachers, textbooks, chairs, desks or a safe, appropriate school environment mentioned. One of the questions we have to ask is: What does the Constitution require? The answer is simple: It asks us to breathe life into the Constitution and help explain to those in power how we understand these rights and therefore what we demand. In this way, we help determine the content of the rights in the Constitution.

Members of **Parliament** and **government** officials make laws and policies which give more detail to what these rights mean, while Courts are empowered to determine whether they do so appropriately. But it is up to us to decide whether their efforts are satisfactory and whether they aim high enough.

In this way we are all constantly involved in understanding what our own rights mean. Because it is the people who govern, if we disagree strongly and effectively enough with how our government understands our rights, we can use our own power and the power we get from the Constitution to make them real.

LIMITING YOUR RIGHTS

In any democratic society, individuals' rights can, at times, come into conflict. For instance, one person's right to freedom of expression might clash with another's right to dignity or privacy. Without limitations, the exercise of one right could severely infringe upon or nullify another. The South African Constitution, recognising this, includes **Section 36, the general limitation clause**, which states that: Rights, therefore, do not just let us do whatever we want. This is because we must remember that

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

we are not the only ones with rights, and sometimes protecting one person's rights might infringe on another person's rights.

Someone's rights may also be justifiably limited if the **government** has passed a general law with an important purpose. For example, if someone is convicted of a serious crime and then imprisoned, her freedom of movement is limited because she cannot choose to go where she wants to. This limitation, however, is for the important purpose of safety and security. The limitation also does not mean that anything goes. In prison, she still is entitled to her other rights, and any government action that does not respect this is unconstitutional.

But how should we decide between rights when they are in conflict, and how should we decide whether a right has correctly been limited for an important government purpose? The **Constitution** has a solution for this, called a limitations analysis. This helps Courts determine a conflict between

rights, but also is important for setting the standards for when rights can be limited. Rights, the Constitution says, can only be limited to the point that is reasonable and justifiable in a society that is open and democratic, and that is based on **dignity, equality** and freedom. Even the limitation of rights must be done according to the values and rules of a society based on the advancement of rights and freedoms and on **social justice**.

There are no hard and fast rules on when rights can be limited. There are, however, some general guidelines for how rights will be limited. Rights can only be limited in a way that is general and applicable to everyone. No rule or law is allowed to limit the rights of one specific person.

Secondly, the limitation must be **reasonable and justifiable** in a society based on **dignity, equality** and freedom. This means that it must make sense given the values of our society. When deciding whether this is so the following must be taken into account:

1. What is the nature of the right? Is it a right that guarantees many other rights? Is it a right – like dignity or equality – that is especially important because of our history?
2. How important is the reason for limiting your right? Why does society need this restriction?
3. Does the invasion of your right stop you from accessing your right entirely, or is it only a small limit on the right?
4. Does the restriction (or limitation) on your right actually have the effect that it is supposed to? Is it actually protecting society in the way that it should?
5. Is there any way that the government could still achieve the purpose it wishes to in a way that would not infringe your rights as much?

To understand how this works, let's take an example which we discuss later, at p. 33: the death penalty. In step 1, it easy is to see that the death penalty clearly infringes the right to life: whoever is sentenced to death and then executed is totally deprived of their right to life. Looking at the first step, the right to life is a fundamentally important right. Without it, we cannot enjoy any other rights.

The right to life is also very important because of our history. Many people, including political activists, were killed during apartheid because of their beliefs and actions. In our constitutional democracy, we promise that this will not happen again. On to step 2, some people argue that there are important reasons to have the death penalty: it deters people from committing crimes, because they will be scared about being sentenced to death, and it might feel important to the victims of the crime that the criminal is harshly punished. But there are good reasons not to have the death penalty. Our

criminal laws emphasise that people can be rehabilitated and remain important members of society, even if they have committed serious crimes. Also, in countries that do sentence people to death, there have been many examples of innocent people being killed. And the idea of the state killing anyone goes against a society that is committed to the dignity and equality of all. So, the reasons in favour of the death penalty are not all that strong. As for step 3, it is clear that the death penalty does stop you from enjoying your right to life – or any other rights – entirely. So, it is a total deprivation of these rights. Step 4 asks whether the death penalty has the effect it is supposed to. Because of the serious questions about whether or not the death penalty actually deters crime, most people who have studied and argued about the death penalty come to the conclusion that it does not have these effects. Finally at step 5, there are ways that the government can achieve the same purposes – of protecting society and ensuring that dangerous crimes are taken seriously – without resorting to the death penalty. So, the death penalty does not pass the limitations analysis.

EQUALITY

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Historical Context

Equality is a **founding value** and also a fundamental right. Even though our Constitution clearly recognises how important equality is, South Africa remains one of the most deeply divided societies in the world.

The right to equality is especially important in South Africa because of its history. Centuries of oppression through **colonialism** and **apartheid** mean that for many years the majority of South Africans were discriminated against on the basis of their race. These systems gave some people better access to education, jobs, land, and political power, while others were systematically excluded and oppressed. Unfortunately, some of this discrimination has carried over into the new South Africa and many people still face significant barriers in enjoying their rights.

The Constitution was written to help correct these injustices. It allows the government to take proactive measures like **Black Economic Empowerment** and **Affirmative Action** programmes, which we explain below. Government is allowed and even required by the Constitution to take steps to support individuals or groups who have been disadvantaged by unfair discrimination. This means those who are historically and currently disadvantaged because of their race and gender have more opportunities to enjoy their rights.

Race and gender are important grounds of discrimination to tackle, because historically they were bases for systematic oppression. But there are many grounds on which people can be unfairly discriminated against.

One example is **sexual orientation**. Historically, gay and lesbian people have been victims of severe discrimination and, in many parts of the country and the world, are still discriminated against. This is not acceptable – who you are attracted to and who you love is an important part of your identity. The Constitution recognises this and, in South Africa, couples who are of the same-sex (such as gay and lesbian couples) can marry each other and build families. This is because of the right to **equality**, and to **dignity**. It is crucial that no one is discriminated against on the grounds of their sexual orientation and who they love or want to be emotionally or sexually intimate with.

Equality also plays an important role in helping people enjoy other constitutional rights. Many rights, especially socio-economic rights such as access to housing, education, and healthcare, cannot be fully realised without equal access to resources and opportunities. By promoting equality, the Constitution aims to create a society in which all people have a fair chance to live with dignity and freedom.

READ:

> *'Lethabo is the only black player in his school's first rugby team in a conservative platteland town and has to fight back against racism from competing teams. But when he is unexpectedly made captain, things get nasty, and violent, on his own team. Meanwhile, his new status means the beautiful Tercia suddenly takes an interest in him. How will everything play out, both on the field and off?'*

To read this story, *Foul Play*, by Bobby Jordan, also available in Sesotho as *Papedi e Mpe*, and other stories about the Bill of Rights, visit live.fundza.mobi/home/library/fiction-short-stories/foul-play/

What Does it Mean to Be Treated Equally?

All people are entitled to benefit from and enjoy the rights in the Constitution equally. No one may be unfairly discriminated against, as this violates the right to equality.

Although the law aims to treat people equally, we know the world does not always treat people fairly or justly. When someone treats you differently, for example, because you are black or a girl, without a good reason to do so, it is called **unfair discrimination**.

The Constitution of South Africa outlaws unfair discrimination based on **gender**, race, **sexual orientation** and many other listed factors. Importantly, unfair discrimination based on something like HIV status, which is not mentioned specifically by the Constitution, is similarly prohibited because it undermines your right to

THE CONSTITUTION =
NO DISCRIMINATION
No discrimination is permitted on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
~ Section 9 of the Constitution

equality and dignity and there is no good reason for it. Most often, people treat HIV positive people differently because of fear, misunderstanding, or harmful beliefs—not because of facts. *The right to equality means that significant differences between people alone are not a good enough reason for them to be treated differently by the government, their employers or even their friends.*

Does Equality Mean that Everyone Must Always Be Treated the Same?

Sometimes treating people in the same way does not actually allow them to enjoy their rights equally. The South African Constitution says that all people are equal. But there are two ways to think about equality: formal and substantive equality. **Formal equality** means that the rules and processes that apply to people must be the same for everybody. So, for example, if in a criminal trial different rules apply to a Muslim person accused of a crime, than to a Christian person accused of the same crime, this will violate formal equality. Formal equality is protected in the Constitution – no one is above or below the law.

Substantive equality means that, as we work for a more equal society, we must also look at the patterns of discrimination and injustice that still affect people. So, we must not just look at what the law or policy says on paper, but also at the *effect* of laws and policies. Sometimes, this requires us to put in place special, or particular, measures of protection to ensure that everyone actually gets equal benefit of the law. For example, if two learners go to school, but one has a disability and cannot use the stairs or read standard textbooks, then both children are not truly equal – even if the rules say they both have the right to education. The Constitution also recognises this: everyone has the right to full and equal enjoyment of all rights and freedoms, and the government must create measures to protect and advance persons who are disadvantaged by unfair discrimination.

One example where substantive equality is required for **social justice** is in making sure that the rights of persons with **disabilities** are protected. More than three million people have some form of disability in South Africa. Disabilities can be physical, mental, emotional, intellectual and psycho-social, and a wide range of interventions are required to make sure that persons with disabilities have equal access to their rights. Promoting the equality of people with disabilities can mean insisting that schools have the systems and support structures in place to provide equal opportunities to learners with barriers to learning. This is so that these learners can receive the same standard of education as children without disabilities. If a learner with a disability is not able to learn at a school with facilities such as ramps for wheelchairs, or braille textbooks, then the learner will not actually have equal

access to her right to education, and this will also violate her right to equality. To just say that all children have the right to go to school, but not ensure that children who face bigger struggles can get to school and that they can learn when they are at school would mean very little. This is why equality does not just mean using the same rules or processes for all people. To reach the same result we sometimes need to treat people differently. It is important to put measures in place to deal with disadvantages. To read about the rights of learners with disabilities, turn to p. 145.

So, equality does not just mean that the same formal processes and rules apply to everyone. This would mean very little. It also means that important measures to address disadvantages must be taken.

CASE STUDY: AFFIRMATIVE ACTION

In South Africa, we have lots of inequality in the workplace. For many years, workplaces were dominated by white men. In our country, for historical reasons, people usually have more access to education and opportunities to succeed in their careers just because they are men and white. Most powerful CEOs, business owners and social leaders are men because men are given more opportunities, or because workplaces are hostile to women. Today, even though everyone has the right to equality, and the right to choose an occupation, many people assume that people are smarter or better workers just because of the colour of their skin or their sex. This often makes it more difficult for people who are black and/or women to get jobs or promotions.

To give women and black people (especially black women) as well as people with disabilities the same chance to succeed, we need to make sure that opportunities also go to these people. Affirmative action measures do just that. Larger employers must improve the situation of women, black people and people with disabilities in workspaces. Although affirmative action treats people differently specifically because of their race and gender, this treatment is to further equality – it aims at evening out historical unfair discrimination. Affirmative action allows women, black people and persons with disabilities an equal chance at education and employment and makes South Africa less unequal.

Activating Your Rights

If you think that you have been unfairly discriminated against, you can approach the South African Human Rights Commission, the Commission on Gender Equality or any Equality Court in your area.

Equality Courts can usually be found inside Magistrates Courts. An Equality Court can make orders to address the unfair discrimination, including orders for payment, for an apology and orders to stop the action from continuing. For more information and contact details, turn to pages 172 to 173.

Thinking about our rights: *do you think that fathers have an equal responsibility to mothers in raising their children? Do you think they should have equal responsibility?*

HUMAN DIGNITY

Section 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

What Does Dignity Mean?

The **Constitution** says that everyone has a right to dignity, and that this dignity must be respected and protected. Dignity may have different meanings in different languages and cultures. During **apartheid**, many daily indignities were inflicted on black South Africans by the **government** and other people. The Constitution requires us to replace, in all of our interactions, this disrespect, devaluing and oppression with a fundamental respect for each other based on our shared humanity. Dignity means that every person has value. It means you matter. You should be treated with respect, simply because you are a human being.

The Constitution acknowledges that we have this dignity inherently. You are not given dignity by someone else. You are born with it. The Constitution says that this dignity is part of who you are, and no one has the right to take it away.

Sometimes it can be hard to say exactly when someone's dignity is harmed, but if you are made to feel ashamed, disrespected, ignored, or unsafe, that could be a sign. Some examples of when your dignity may have been harmed are:

- When you are treated with disrespect for being yourself: being a woman, a poor person, HIV positive or gay;
- When you are made to feel embarrassed or humiliated for being yourself;
- When you are treated as if you are not a human being or not of equal worth to other human

beings;

- When you are forced to live in very difficult circumstances and struggle to access the basic necessities, like water, food, housing, education and healthcare;
- When something intimate or personal to you is disrespected;
- When, in making a decision, the government, your employer or a family member does not take into account your importance as a human being; and
- When your decisions are treated as invalid or unimportant.

Rights like dignity show why it is so important for us to explain and define our own rights. No one else can tell you what it means to be you: you must help us all understand what living with dignity requires for you.

READ:

> 'All Sipho wants to do is fit in at his new school. So far, his only friend is Gloria, the daughter of one of the school's cleaners, Agnes. When some Grade 11 boys promise Sipho friendship, he leaps at the chance to join their 'cool' crew. Gloria and Agnes both warn him off the boys, saying that they are dangerous. But Sipho doesn't listen…'

To read this story, *The Cleaner*, by Sicelo Kula, also available in Afrikaans as *Die Skoonmaker*, and other stories about the Bill of Rights, visit live.fundza.mobi/home/library/fiction-short-stories/the-cleaner/

My Dignity, Your Dignity

The way we experience dignity can differ. What makes one person feel disrespected might not bother someone else. But the law recognises that we all have the right to live with dignity, and that means our choices and feelings matter. At the same time, dignity is also about how we treat one another. If you treat someone else badly, you are also hurting your own dignity. That's because we are all connected. The way we live and relate to others helps build a society where everyone feels valued. The traditional African philosophy of **Ubuntu**, which the **Constitutional Court** has said is deeply embedded in our Constitution, helps us understand the interconnectedness of all of our lives. We are part of a complicated and diverse society in which our lives are all connected in hundreds of different ways.

CASE STUDY: SCHOOL TOILETS

Many schools in South Africa do not have proper bathroom facilities like toilets, basins and dustbins. Let's think about how this impacts on different rights. If there are no toilets, learners have to go home or use the bushes to relieve themselves. Snakes living in pit toilets have bitten learners and some learners have even fallen into them and died. If there are no dustbins in the school toilets, then there is nowhere for girls to throw away pads or tampons that they need to use during their periods. This might mean that when a girl has her period she does not come to school at all. Now think about having to go to the toilet in a dirty environment where you have no door or walls and whether this makes you feel respected. Having to do something so personal and private in front of people probably makes you feel embarrassed and uncomfortable and is not a dignifying experience. That is an infringement of the right to human dignity.

Thinking about our rights: *when a woman walks past a man on the street, do you think it is okay for him to make comments about the way she looks, or to touch her without her permission?*

OPEN AND DEMOCRATIC SOCIETY

02

OPEN AND DEMOCRATIC SOCIETY

The **Constitution** envisages a South Africa which is an **open and democratic society**. It does so by setting the need "to ensure **accountability**, responsiveness and openness" as **founding values** of **democracy**, alongside respect for **dignity** and the achievement of **equality**. The rights in the **Bill of Rights** help us as individuals, families of all different shapes and sizes, communities and society at large to be able to participate in this open and democratic society.

While most of the rights in the Bill of Rights contribute in some way to enabling participation there is a distinct set of rights that are especially aimed at protecting our ability to participate in public life - **political** and **individual** freedoms. These include the rights to freedom of expression, freedom of assembly, freedom of association, freedom of movement and political participation. These rights allow people to express opinions, organise collectively, hold public office and engage in civic life, whether as individuals or as groups.

Importantly, people must be able to participate without interference from the **government** or other people. Many of these rights can be made use of by groups of people or by individuals. While we do not need other people to agree with or join our attempts to protect or express our political, religious and cultural opinions, often acting with others will assist in making our concerns and demands louder, more easily heard and impossible to ignore.

For example, while you may express your right to freedom of expression individually by painting a picture, singing a song, asking for a meeting with your municipal councillor, writing an article or saying what you think and feel, it can be more powerful if you express your common point of view together with other people who share your views. Collective forms of expression like protests, petitions, community meetings, group singing, dancing, chanting, writing petitions or memoranda of demands to government departments, often have greater impact. This community-based aspect of our rights shares close ties with the philosophy of Ubuntu, which reminds us that we as individuals are part of – and connected to – other people and communities.

One way to express your political rights individually is to vote in national, provincial and local elections. But, since elections happen once in a number of years, it is important for us to think about other ways to participate in democracy in between elections. The Freedom Charter insisted that "The People

Shall Govern!" The Constitution carries this idea forward by embodying the idea of "**participatory democracy**" – a principle that ensures that citizens are continuously able to influence laws and policies. It requires that when **Parliament** makes laws or the **executive** forms policies, that we must be given a meaningful opportunity to comment, make suggestions and have our suggestions taken seriously. The Constitution does not only say that we can participate in making and changing laws. It also requires that Parliament and the executive must ensure that the public can meaningfully contribute to their work to make sure that government departments are doing their jobs properly. This includes listening to comments, considering suggestions, and ensuring that people's input is not treated as a mere formality.

Beyond lawmaking, public participation is required in holding the government accountable. Existing laws also create opportunities for us to be involved in the running of and management of institutions that give us access to our rights. Good examples are participation in the management of schools through **school governing bodies** and assisting in running clinics and hospitals through participation on **hospital boards** and **clinic committees**.

Open democracy and participatory democracy are in some ways two sides of the same coin. On one hand the government has the **obligation** to keep people informed of what it is doing to make our rights real and how we can get involved. On the other hand, the government must respect and protect our rights to choose how to express our views. The government also must do this in a way that is meaningful – it cannot just put in place processes that are token. In this way, our Constitution and other laws give us many opportunities to be involved in the governance of our country.

For people to effectively participate in an open **participatory democracy**, the state must **respect, protect, promote and fulfil** the rights and freedoms entrenched in the **Constitution.** Many of these rights are detailed and discussed in this section, including the rights to life, freedom of expression, freedom of movement, the right to culture, freedom of assembly and property.

Together, these rights create the foundation for a society where every person can engage in the democratic process with freedom, respect and purpose.

LIFE

Section 11. Everyone has the right to life.

The right to life is one of the most fundamental rights in the Constitution and it forms the foundation

for the enjoyment of all other rights. Without life, no other rights can be exercised. There are two important aspects of the right to life to think about.

First, no one, not even the state, may take your life away. This is in contrast to our country's history: under apartheid South Africa, judges had the power to impose the death penalty on people found guilty of certain crimes, like murder and treason.

Second, the quality of life you enjoy should be thought of in connection with your other rights. Many other rights in the Constitution are connected to this aspect of the right to life. For example, you cannot live without sufficient food, water and access to healthcare services. So these rights and the right to life are connected.

FLASHBACK: RIVONIA TRIAL

The historic Rivonia Trial took place between 1963 and 1964. At the trial, 10 leaders of the ANC, including Nelson Mandela, Ahmed Kathrada and Walter Sisulu were tried for terrorism and treason, with eight being convicted. The convicted trialists were each sentenced to life imprisonment.

Whilst a devastating sentence, it was also somewhat of a relief, because at the time of the trial there was a very real danger that they would be given the death penalty. Between 1961 and 1989 the apartheid government executed 134 political prisoners. Officially, the government performed 2949 hangings between 1959 and 1989. Many more people were also killed by the state unofficially (in detention or elsewhere).Many, though not all, of the hangings and other killings by the apartheid state, were for the specific reason that the victims disagreed with the government's apartheid laws and policies and were trying to put an end to this system of racial domination and oppression.

CASE STUDY: S V MAKWANYANE

Given this history, it is fitting that one of the first cases to be decided by our Constitutional Court was about whether the death penalty matched up to the new standards set by the rights in the Bill of Rights including the right to life. At the time, although there had been no executions since late in 1989, there were 243 people in prison who had been convicted and sentenced to death: for them this case was very much a matter of life or death.

For different reasons all 11 judges of the Constitutional Court agreed that the death penalty is

inconsistent with many of the rights in the Bill of Rights. The Court decided that the punishment of putting someone to death is not in keeping with our new constitutional order, including the rights to life, security of the person and human dignity. It acknowledged the history of abuse of state power to take the lives of political dissidents during apartheid and noted also that killing someone for his or her crimes would serve little purpose, as there is no conclusive evidence that doing so will reduce the crime rate or discourage people from committing serious crimes. Such criminals may be punished seriously through life imprisonment, but their lives cannot be taken away. The Court emphasised that even though a majority of South Africans supported the death penalty at the time, constitutional rights could not be overridden by public opinion. The Constitution demands protection of life, even in difficult cases.

The judgment: S v Makwanyane and Another [1995] ZACC 3

The right to life also means more than just the right to not be killed. It includes the right to live with dignity and in conditions that allow for survival and development. This has been reinforced by the Courts in their interpretation of socio-economic rights, such as access to healthcare, food, water, and social assistance.

CASE STUDY: KHOSA V MINISTER OF SOCIAL DEVELOPMENT 2004

In Khosa v Minister of Social Development, the Constitutional Court examined whether permanent residents should have the same right to access social grants as South African citizens. The applicants, Mozambican nationals lawfully residing in South Africa, were excluded from receiving old-age and disability grants solely because they were not citizens. The Court held that this exclusion was unconstitutional as it violated their rights to equality (section 9), social security (section 27), and dignity (section 10), and had serious implications for their right to life (section 11). The Court found that the government had not provided a justifiable reason for denying permanent residents access to these essential forms of social support. This case reaffirmed that socio-economic rights, including access to basic financial support, are essential for survival and that the right to life must be interpreted to include the conditions necessary to live a dignified and meaningful existence.

The judgment Khosa v Minister of Social Development and Others 2004 (6) SA 505 (CC)

The Right to Die?

A big question that has not yet been resolved is whether the right to life also includes a right to be assisted to die when a person is so sick that they will not recover and are suffering greatly. This is referred to as voluntary assisted dying or euthanasia.

There are two main forms of voluntary assisted dying. The first is active voluntary assisted dying, where a doctor directly administers or prescribes a lethal substance to intentionally end a patient's life at their request. This form of voluntary assisted dying is currently illegal in South Africa, even if the patient consents.

The second form is passive voluntary assisted dying, which involves withdrawing or withholding life-sustaining treatment with the patient's consent. This practice is legally permitted under South African law, provided it aligns with the patient's wishes and medical ethics.

In *S v Makwanyane*, the court held that the right to life does not mean biological survival at all costs but also encompasses the need to treat people with dignity and respect. Although the case did not directly address euthanasia, it shaped the constitutional interpretation of life as an encompassing quality and dignity of life.

Current legal position:

- The South African Law Commission's 1998 Report, Euthanasia and the Artificial Preservation of Life, acknowledged the importance of patient autonomy and proposed several options for end-of-life decisions. However, it stopped short of endorsing voluntary assisted dying. Parliament has not acted on these recommendations.
- In *Stransham-Ford v Minister of Justice and Correctional Services and Others* (2015), a terminally ill patient who was suffering from stage 4 cancer at the time, sought a court order to allow a medical healthcare professional in terms of the Health Professionals Act 56 of 1974 to assist him to end his life via the administration of a lethal agent without being held liable. The High Court initially granted his order but since Mr Stransham-Ford had already passed away by the time the order was granted, it was rescinded. On appeal, the Supreme Court of Appeal held that when Mr Stransham-Ford died 'his cause of action ceased to exist', there was 'no full and proper examination' of the current local and international legal position in the light of the Constitution; and the order was based on 'an incorrect and restricted factual basis'. As such, the High Court order was overturned but the Appeal Court left the door open by concluding that assisted suicide is not 'in all circumstances unlawful'.

Thinking about our rights: *do you think that people who are very sick and suffering should be able to give permission to a doctor to end their lives, if they choose to? How are the rights to dignity and autonomy affected.*

Life-Saving Medical Treatment

When people are very sick and need medicine or treatment that can save or improve their lives, but cannot afford it, it is the government's responsibility to provide us with assistance. If you're on a medical aid, it may also be legally obliged to assist you. Sometimes life-saving treatment can be very expensive, and this raises tricky questions about our rights to life, dignity and healthcare, which the Constitutional Court has had to decide. There are also several laws made by Parliament to specify how these rights should be made real.

CASE STUDY: SOOBRAMONEY

Like many South Africans, Mr Soobramoney had diabetes, hypertension and heart problems. Sadly, he eventually had a stroke and suffered from kidney failure. He could not be cured, but if he was given an expensive treatment called kidney dialysis he would be able to live for longer.

At the hospital where Mr Soobramoney was being treated there were not enough dialysis machines for all the people who needed to use them, so the hospital would only give the treatment to people who had a good chance of getting better and surviving. It denied Mr. Soobramoney treatment, saying that because Mr Soobramoney could not be cured and did not have a good chance of surviving, they could not justify prioritising his treatment over others. Desperate, and fearing that he would die without the dialysis treatment, Mr Soobramoney approached the Constitutional Court, arguing that he was being denied his rights to life and emergency medical treatment.

The Constitutional Court decided that because the hospital's funds were already stretched and it had shown that it could not afford to provide the expensive treatment to Mr Soobramoney and other patients with similar conditions, it was reasonable that it did not prioritise treating terminal illnesses. It was a devastating judgment for Mr Soobramoney and his family, he died soon afterwards.

The judgment: Soobramoney v Minister of Health (Kwazulu-Natal) [1997] ZACC 17

Thinking about our rights: *What do you think? Should the court have decided in Mr Soobramoney's favour even though the hospital had a good reason for not providing him with dialysis?*

The right to life is more than a prohibition against unjust killing. It is a commitment by the state to uphold the dignity, health, and survival of all people in South Africa. This includes not only protection from harm but proactive measures to ensure that people can live meaningful, healthy lives. Through the evolving jurisprudence of the Constitutional Court and supporting legislation, the right to life continues to be interpreted as a holistic right, intrinsically connected to justice, equity, and human dignity.

FREEDOM AND SECURITY OF THE PERSON

Section 12.

(1) Everyone has the right to freedom and security of the person.

(2) Everyone has the right to bodily and psychological integrity.

The right to freedom and security of the person is the right to be in control of your own body and mind. It ensures that you are protected from violence, harm or interference, (physical or psychological) by the state, your employer, colleagues, strangers, your family or even a romantic partner.

READ:

> 'Mihlali's dream has come true. She has left the farm where she grew up, and where she was in danger every day, to pursue her dream of a new life. But on her first day at the new school Mihlali discovers that her past has followed her, and even in the safety of the hostel, she might still have nowhere to hide…'

To read this story, *Nowhere to Hide*, by Michelle Faure, also available in isiZulu as *Ayikho Indawo Yokubaleka*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/nowhere-to-hide/

Your Body, Your Choices

Having a right to psychological and bodily integrity simply means that you are in control of your

own body and mind. You have the right to do as you want and please with your body – as long as the action does not cause any harm to other people or society. This right also protects you from unwanted interference – no one has the authority to control, exploit, or misuse your body. You must be able to freely inhabit and enjoy your own body.

The Right to Control Your Own Body

No one may do anything that harms your body, or force or coerce you to do something that you do not want to do with your body. This means, for example, that nobody can beat you, pressure you into sexual activity or force you to have an abortion. At the same time, no one can prevent you from having an abortion or receiving life-saving medical treatment such as a blood transfusion within the limits that we have already discussed above.

The Constitution recognises and protects everyone's right to bodily integrity, which includes people in an intimate relationship. You have the right to decide if, when, and with whom you have sex. No one including your husbands, girlfriends or partner, can force, coerce or pressurise you into sexual activity against your wishes. This is part of your right to make decisions regarding your own body.

Reproductive Justice: Access to Condoms, Contraception, and the Choice to Terminate a Pregnancy

Part of the right to bodily integrity is the right to make reproductive choices, including about whether and when you want to have children. For many decades, women and girls were denied this right. Because of gender inequalities and a lack of access to healthcare, they often did not get to decide if and when they wanted to have sex and if and when they wanted to be pregnant and have children. The Constitution seeks to change this history.

In terms of your Constitutional and legal rights you should be able to choose if and when you want to have sex, if and when you want to be pregnant, and if and when you want to have children.

In the *Teddy Bear Clinic* case (see also p. 135), the Constitutional Court held that it is perfectly normal for adolescents to be curious about sex and to engage consensual sex with other adolescents of similar age. The Court held that in criminalising such conduct violates adolescents' constitutional right to dignity, privacy, and bodily and psychological integrity (as enshrined in their right to freedom and security of the person).

This right to make reproductive choices includes access to free and accurate information about contraceptives and the ability to access contraceptives yourself. Under the Children's Act, from the age of 12, you have the right to obtain contraceptives from a public clinic free of charge or from a private doctor or hospital if you can afford to pay.

If you request contraceptives other than condoms at a clinic, the nurse or doctor must examine you to determine which contraceptive is best for you. They must also provide you with information on how to use the contraceptive effectively and advise you of any possible side effects. Importantly, your request must remain confidential. The nurse or doctor may not tell anyone about your request, and failure to provide contraceptives or to respect your privacy is a punishable offence.

If you do become pregnant, and for whatever reason you do not want to have a baby, you have the right to obtain a legal and safe abortion. In 1996, **Parliament** passed the Choice on Termination of Pregnancy Act, which is the law governing abortion in South Africa. Some groups have challenged the law, arguing that it is not constitutional because it undermines the interests of unborn children. However, Courts have found that a person only has the right to life once they have been born. Fetuses, therefore, do not have the right to life. This law protects women's rights, and plays an important role in our **democracy.**

The Choice on Termination of Pregnancy Act protects women's rights to make decisions about reproduction and their own bodies, reinforcing the rights to gender equality, and a woman's right to bodily integrity, reproductive health and her freedom and security of her person.

The Choice on Termination of Pregnancy Act guarantees access to safe procedures:

- **Up to 12 weeks:** Any woman may end a pregnancy for any reason, without explanation.
- **13th to 20th week:** Termination is allowed for medical or social reasons.
- **After 20th week:** Termination is permitted if the fetus would be severely malformed or injured, or if continuing the pregnancy would endanger the woman's life.

You do not need parental consent to have an abortion, even if you are under 18. However, it is advised that younger women seek the support of an adult such as a parent, teacher or other trusted adult, but this is not required. You cannot be denied an abortion just because you have not consulted with your family or friends.

You can exercise your right to terminate your pregnancy by accessing the procedure free of charge at a government hospital or clinic. If your doctor does not perform abortions, they must give you

a referral letter for a doctor, hospital or clinic where you can receive the service. Failure to refer a patient can be interpreted as preventing or obstructing access to abortion services, violating the Choice on Termination of Pregnancy Act.

You also have the choice of going to a private hospital which will be more expensive, or a non-profit clinic like Marie Stopes which will charge you based on factors including the gestational age of the pregnancy and the specific procedure.

Even though the law protects a woman's right to have an abortion, it is often a deeply personal and difficult decision for many women to make. In reality, many women are put in positions where they do not have complete say in the decision to have sex, to become pregnant or go through with the pregnancy. Respecting and upholding women's decisions is central to reproductive justice and to South Africa's constitutional democracy.

Rape

Rape occurs whenever a sexual act takes place without your full, free and voluntary consent. Consent means that you willingly and freely agree to a sexual act without being forced, threatened, pressured or manipulated. If someone uses threats, intimidation or abuse of power to make you submit, that is not true consent.

For example, if your boss threatens to dismiss you from employment, or if your teacher threatens to fail you, or your partner or a family member threatens you with violence or to withdraw financial support in order to force you into a sexual act, the law recognises that your consent is coerced.

Rape does not have to be as a result of physical force. Any time when you have not fully consented to performing a specific sexual act with someone, or have withdrawn consent after beginning a consensual sexual act, it will still amount to rape if the person does not respect your choice. Similarly, if you want to use a condom while having sex and you make this desire clear, it is a violation of your right to bodily integrity for the other person not to respect this choice. South Africa has extremely high levels of rape and sexual violence, and the majority of victims of sexual violence are women and young girls. Our society continues to struggle with deep gender inequality, and women are particularly vulnerable to sexual violence, especially in intimate relationships. This is not to say that only women are forced to engage in sexual acts against their wishes. Boys and men (including gender non-conforming men) are also victims of **rape** and sexual violence and need support structures too. The **Constitution** regards women as equal to men. Part of protecting both men and women's rights

to bodily integrity means that everyone, no matter your sex, gender identity or **sexual orientation**, has the right to make decisions about who to have sex with and how often.

The Sexual Offences Act defines rape as forced sexual penetration of a person's genital organs, anus, mouth or any other part of the body with a penis or an object that can be used for sexual penetration. It is rape when someone forces or coerces you, against your wishes, into having sex with them, or puts any object into your anus, vagina or mouth.

Often, people are raped not by complete strangers, but by their boyfriends, husbands, wives, girlfriends, intimate partners, family or friends. This in no way changes the fact that it is a crime. Sometimes your husband/wife or partner may assume that they are entitled to have sex with you whether or not you agree to it. Just because you have agreed to have sex with someone before, once, or many times, does not mean that you agree to do so again. Just because you agree to one sexual act with a person, it does not mean that you have agree to other sexual acts in the same interaction with that person – if at any point you want to stop you have a right to do so. If anyone – even your romantic partner, husband or wife – forces you to perform any sexual act with them when you have not consented then you can report them to the police for rape and sexual assault.

Activating Your Rights

If you have been raped, the first step is to go to your nearest police station and inform the police about the incident. The police will then give you a **J88 form** for a doctor to complete as well as a **rape kit**, after which you should then go to a hospital or clinic as soon as possible. If there is a Thuthuzela Care Centre near you, you can go there for medical and legal advice, and to report the rape.

It is very important to seek help within 72 hours (three days). There are two main reasons that this is very important: you may need urgent medical treatment and counselling, and the medical staff needs to be able to collect evidence if you wish to lay a criminal charge. If your attacker is HIV-positive, or has some other sexually transmitted infection, there is a chance that you may have been infected during the attack. At the clinic you must be given a Post-exposure Prophylaxis (PEP) treatment, which can reduce the chances of HIV infection.

If you did not have an opportunity to give a statement to the police about the rape you may do so after you have been to the hospital. This is important so the person who raped you can be prosecuted, if this is what you want to happen. If you are not comfortable providing the information or speaking about the incident, you do not have to.

Once the J88 form is complete and the evidence has been collected you can take time to decide if you want to lay a charge of rape. It is quite difficult to prove rape because there are often no witnesses, and that is why it is very important, whether you decide to lay charges immediately or not, to go to the hospital or clinic as soon as possible after being attacked. At the hospital or clinic, nurses or doctors who attend to you must keep all the evidence of your attack. To help preserve DNA evidence of the attacker (which is present in bodily fluids like semen and blood) it is best not to shower, wash your hands, urinate, or defecate before going to the hospital. If possible, do not wash or throw away the clothing you were wearing at the time of the rape.

When you go to the police station it may help to bring someone with you for support such as a social worker, lawyer, or trusted person who understands the legal process. The police must open a docket and take your statement. They should only ask you questions that are relevant to your health, safety and the attack, and should be sensitive towards the trauma you are experiencing.

Many victims of sexual violence have lost faith in the criminal justice system, often because victims are not treated with respect and sensitivity. Everyone has the right to bodily integrity, which includes the right not to be attacked, beaten, raped or sexually assaulted. The state has the legal duty to protect you from violence, and to investigate, prosecute and punish all criminal offences. This duty applies to those who are working in hospitals or clinics, police stations and Courts. You have the right to seek help without being shamed, and the right to be treated with respect and dignity. If any state officials fail in their duties, you may lodge a complaint against the doctor, prosecutor or police officer, or approach lawyers to help you sue the state.

If you need help, or are not sure of what to do, or you just want to talk to someone about what has happened to you, you can approach LoveLife or LifeLine. Both organisations have qualified counsellors who can provide confidential counselling and support:

LoveLife: 011 523 1000
LifeLine: 0861 322 322

CASE STUDY: CARMICHELE

Ms Carmichele was sexually assaulted by a man who was awaiting trial for having attempted to rape another woman. Despite the attacker's history of sexual violence, the police and prosecutor had recommended his release without bail. Ms Carmichele sued the two Ministers concerned for monetary damages resulting from the sexual assault. She argued that by letting the man out on bail

the police and prosecutor failed to act in a way that would protect other people from being sexually assaulted by this man. She argued that the Constitution imposed a duty on the police under the rights to life, equality, dignity, freedom and security of the person and privacy.

The Constitutional Court held that the state is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. The Constitutional Court said that it is important that women be free from the threat of sexual violence.

The police were wrong in recommending that the attacker be released on bail and the prosecutors were wrong because they failed to put the attacker's violent history before the Court during the attacker's bail hearing. The actions of the police and prosecutor amounted to wrongful conduct and failed to fulfil their constitutional duty towards Ms Carmichele and were liable to pay her monetary damages.

There is therefore a duty on state bodies like the police and members of the criminal justice system such as prosecutors to act in a way that may prevent harm and violation of your safety, particularly when there is a known probability that harm may occur.

The judgment: *Carmichele v Minister of Safety and Security* [2001] ZACC 22

Domestic Violence

The law protects you from **domestic violence**. You are considered to be in a domestic relationship with someone if you live with that person or if you are in a close relationship with that person (even if you do not live together all the time), if they are a family member or if you share family responsibilities with them. A partner, parent, sibling or child can be guilty of committing domestic violence.

Domestic violence takes many forms and does not only mean physical abuse. It also includes verbal, emotional, economic, psychological and sexual abuse.

If you are experiencing domestic violence or abuse, the first thing to do is to find a place of safety, such as staying with a trusted friend or family member. Taking legal action against an abusive partner can sometimes make them more aggressive, so it is important not to remain in the same home if you fear for your safety.

The most effective legal action available to you is to apply for a protection order against your partner. A **protection order** is a legal instruction that instructs the abuser not to harm you, threaten you or come near you unless you choose otherwise. If they violate the order they will be committing two crimes: the abuse itself and the offence of ignoring a court order.

Activating Your Rights

To apply for a protection order, you must go to the police station close to where you reside. You tell the police that you want to apply for a domestic violence protection order. They will give you a court form to fill out and will give you a date to appear at the Magistrates Court. The form is simple to fill out, but you can request legal assistance from various organisations or a domestic violence clerk at the Magistrates' Court that will help you to fill out your application. When filling out the form, it is important to explain clearly why you are afraid of being attacked or abused again in the future. A protection order is designed to protect against further abuse – it does not deal with punishing an abuser for past incidents, but can prevent the abuser from coming near you. If you want to lay a criminal charge against your partner, you must do so separately.

After your first appearance in the Magistrates' Court, the Magistrate may grant you an interim order, and a second court date. A copy of the interim order will be delivered to the abuser. At the second court date, the Magistrate will decide whether or not to grant a permanent protection order.

Once you have a protection order in place, the abuser has an extra duty not to harm you. If they violate the order by attacking you or coming near you against your wishes, you should immediately report them to the police. The violation of a protection order is easier to prove in court than a case of assault, and the police are required to arrest the abuser for breaking the order.

Preventing The State From Unlawfully Restricting Your Freedom and Interfering With Your Body

The Constitution protects everyone against unlawful interference with their body by the state. Although rights may sometimes be limited by law with a good reason, that does not mean they disappear. This means, for instance, if you are suspected of committing a crime, you may be handcuffed or imprisoned, but you do not lose your other fundamental rights – even while in jail.

During **apartheid**, the state often abused people's bodies and freedoms, through police violence, torture and the mistreatment of political prisoners in prison.

The drafters of the **Constitution** dreamed of a country and a society that respected human **dignity** and outlawed the many abuses committed under the apartheid laws. Today the Constitution protects your body against force from the state, whether it is by the police, prison wardens or any other state official. The state can only use force on people if it is absolutely necessary and does not go beyond what is required given the specific circumstances. The state is only permitted to use as much force as is necessary to achieve a lawful purpose, such as making an arrest, protecting people from harm or preventing violence. Any use of excessive or unjustified force is unlawful.

What Rights Do I Have When the Police Confront Me?

The Constitution requires the police to ensure the safety and security of all people in South Africa. The police do not have a right to search you if they do not have a warrant or a reasonable suspicion that you have committed a crime.

When making an arrest, the police must try to do so peacefully without causing any physical harm. They may only use physical force if it is not possible to make the arrest safely in any other way, for example, if the person being arrested poses a reasonable danger to the officers or to the public. Even then, the force used must be limited to what is necessary in the specific situation. Any force that goes beyond this is unlawful and a violation of your constitutional rights.

POLITICAL RIGHTS

Section 19.

(1) Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.

In addition to freedom of association, South African citizens are afforded the right to be involved in formal political processes in South Africa. These are referred to in the **Constitution** as "political rights". Political rights also mean that you have the right to be treated fairly by the political party that you are a member of, and that your political party must follow its own democratic procedures.

> "The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity"
>
> – Justice Albie Sachs in *August v Electoral Commission* 1999 (3) SA 1

Historical Context

For much of South Africa's history, political rights were denied to the majority of its people. Under apartheid, laws systematically stripped black, coloured, and Indian citizens of the right to vote and form political parties. By the 1950s, everyone other than white voters were removed from the common voters' roll, and laws like the Suppression of Communism Act were used to ban political movements such as the African National Congress and Pan Africanist Congress. The government went as far as changing the Constitution to override court rulings that sought to protect voting rights. In 1983, the Parliament tried to divide representation among racial groups; yet, Parliament still excluded black South Africans, fuelling further unrest. By the late 1980s, increasing resistance and international pressure forced the apartheid government to negotiate a transition to democracy.

This transition began with the unbanning of political parties in 1990 and led to the Convention for a Democratic South Africa (CODESA), where all major political groups negotiated the country's democratic future. CODESA and later negotiations ensured that the right to vote and form political parties would be protected in the new Constitution. These agreements shaped section 19 of the Constitution, which guarantees every South African citizen the freedom to make political choices.

The Right to Vote

Resistance movements against apartheid in South Africa united under the mantra of "one person, one vote." It is no surprise then that due to their tireless efforts in dismantling the apartheid regime, all adult citizens of South Africa are entitled to vote. But the Constitution goes even further in protecting political rights. The Constitution affirms the right of all adult citizens to vote, have access to a national common voters roll, regular elections and an open, responsive, accountable multi-party system of democratic government as a founding value for South Africa. This is the political foundation on which the rest of the Constitution is built.

The right to vote extends to all elections – whether national, provincial or local. It includes the right not to not be pressured or intimidated into voting for any particular political party or cause. This means that no one can intimidate another person to vote in a particular way. Elections must be free and fair so that all of our votes must count the same. This also means that every political party must have an equal opportunity to participate in our elections.

> "An environment must thus be created for the public to know more than what is said in manifestos or during campaign trails. As will become apparent below, what is implicitly envisioned by section 19 is an informed exercise of the right to vote."
>
> - My Vote Counts NPC v Minister of Justice and Correctional Services and Another (CCT249/17) [2018] ZACC 17, Mogoeng CJ

READ:

> 'It's an odd situation on campus: Buyekeswa is black and vote-hunting for the DA and Jerome is white and vote-hunting for the ANC. The determined duo use all their persuasive powers to defeat each other…even though romantic attraction gets in the way. But who's the guy in the 'Save the Rhino' T-shirt? Which student will be victorious?'

Disclaimer: This story aims to start discussions around political rights. The characters, events, opinions and policies are fictional. The story is not meant to support, attack, misrepresent or damage the image of any political party.

To read this story, *The Great Vote Hunt*, by Bobby Jordan, also available in isiZulu as *Umkhankaso Onzulu Wamavoti*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/the-great-vote-hunt/

Importantly, we do not only have a right to vote; we have but the right to an informed vote. This means that political parties are obliged to make information available so that voters can make an educated decision on how to cast their vote.

Chapter 9 of the **Constitution** sets up a body called the Independent Electoral Commission (IEC) to make sure that national, provincial and local elections are held, and that the elections are run freely and fairly. The IEC must release the results of the election as soon as possible after an election. South African citizens living or travelling overseas are allowed to vote in national and provincial elections.

What are Free and Fair Elections?

"Free" elections mean that there are no barriers stopping a person from casting their vote. "Fair" elections require that the environment and the systems of the election process allow for **equality** between all parties and all voters. Together, free and fair elections consist of the following: the right to vote; access to vote; non-interference in the voting process; and transparency with candidates to understand who is being voted for and ultimately elected. It is an "informed exercise of the right to vote."

There are four important stages of a valid election process. The first is in the internal party processes before the election even begins. This is one important way that party members can participate in politics, and it is important that parties follow their own democratic processes. The second is in the build up to the election: during this time the parties can campaign and have debates to showcase their policies and attract voters. The third is during the election: at this stage it is important that all **eligible** voters are given a chance to vote and allowed to make their choice privately. Your vote is your secret, which means that you cannot be forced to tell anyone who you vote for or why, though you may choose to do so if you want to. Lastly, after the election, the votes must be counted by neutral people hired by the IEC. For more information on the IEC and how it operates, see this link or the IEC's their phone number at the bottom of this section see below p.188.

CASE STUDY: TRANSPARENCY IN POLITICAL FUNDING

In 2018, the Constitutional Court tackled an important question regarding transparency in political funding: Should voters know who is funding political parties and candidates? The case challenged the Promotion of Access to Information Act (PAIA) for failing to require political parties and independent

candidates to disclose their private funding sources.

The Court made it clear that a truly free and fair election is not just about casting a vote without fear; it is also about making an informed choice. section 19 of the Constitution protects our right to make political choices, and that means we should have access to potential financial influences over political parties and candidates. Without transparency, voters cannot see who might be influencing politicians behind the scenes, and this can lead to corruption and unfair advantages.

The ruling emphasised that political funding secrecy is a major threat to democracy. If we don't know who funds political campaigns, we cannot fully trust the system. By requiring political parties and candidates to disclose their funding, the Court strengthened accountability and fair elections, ensuring that every South African can make informed political decisions—a right protected by section 19 of the Constitution.

The judgment: *My Vote Counts v Minister of Correctional Services and Another* 2018 (5) SA 380 (CC)

CASE STUDY: VOTING FROM PRISON

Mr August was serving a long prison sentence in 1998, when a new Electoral Act (the **legislation** that sets out the rules about voting) was passed. The Act did not have any provisions allowing for prisoners to vote. The **government** said that it would be too difficult to organise for all prisoners to register, and then to vote. However, the **Constitutional Court** ruled that the **Constitution** protects the right of every adult citizen to vote. This right places a **positive obligation** on the state: it has to make sure that there are facilities for all citizens to vote, including in prisons. Today all prisoners have a right to vote in elections in South Africa.

The judgment: *August and Another v Electoral Commission and Others* [1999] ZACC 3

The Right to Run for Political Office and Form Political Parties

The Constitution recognises political parties as one of the most important ways in which we act collectively, to directly exercise our democratic rights. This includes formal political processes in

Parliament, for example. Political parties help us ensure that the **government** represents our concerns and needs.

This is, however, only possible if we manage to hold the political parties, we support **accountable**. Whether we are members or just vote for a specific political party, we must hold them to the promises they make to us, to the members of their parties, and to South Africa as a whole.

The Constitution gives all citizens the right to join together to form political parties. Any citizen can participate in the activities of any political party, including campaigning. All adult citizens of South Africa have the right to stand for office independently or as a member of a political party.

CASE STUDY: SIGNATURE REQUIREMENTS AND DEMOCRATIC PARTICIPATION

When Parliament passed the Electoral Amendment Act in 2023, One Movement South Africa (OSA) raised concerns about a new rule. This rule required independent candidates to collect signatures from 15% of voters in their region (about 10 000 - 14 000 signatures) before they could run in elections.

OSA argued that this requirement created a barrier compared to the 1 000 signatures political parties needed for registration. The government maintained that the requirement was necessary to ensure serious candidates and manageable ballot papers.

The Constitutional Court found that the Constitution protects political participation rights beyond just winning elections. The Court determined that the rule placed an unjustifiable limitation on these rights. Recognising the state's positive obligation to ensure electoral access for all citizens, the Court ordered a temporary reduction to 1 000 signatures while giving Parliament 24 months to amend the law. The case was another step in our evolving electoral system, balancing regulatory needs with constitutional rights.

The judgment: *One Movement South Africa NPC v President of the Republic of South Africa and Others* [2023] ZACC 42

Activating Your Rights

If you are above the age of 18 on the day that an election is proclaimed and you have a valid ID book (or a temporary ID certificate from Home Affairs), you are eligible to vote. If you have never registered before, you will have to register at your nearest voting station. You will then have your name placed on the voters' roll, which is a list of all the registered voters in the country. If you have registered, but cannot make it to your voting station on election day because you are pregnant, physically ill, are or a person with a disability or traveling at the time, you may apply for a special vote during the registration period. For more information on voter registration see below.

The number of the National Office of the IEC is 012 622 5700.

The number for assistance with voter registration is 080 011 8000.

THE RIGHT TO CITIZENSHIP AND FREEDOM OF MOVEMENT

Section 3.

(1) There is a common South African citizenship.

(2) All citizens are—

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

Section 20.

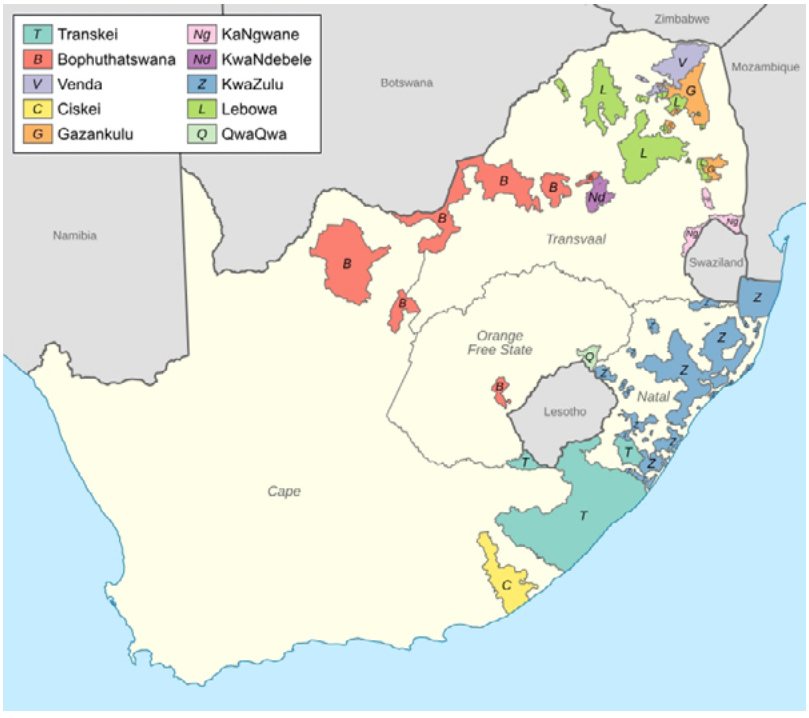
No citizen may be deprived of citizenship.

The Right to Citizenship

Citizenship is the legal link between a state and a person. The Constitution ensures that all citizens share a common South African citizenship with equal rights, privileges, and benefits.

FLASHBACK: HOMELANDS IN DIVIDED SOUTH AFRICA

During apartheid, most people living in South Africa were denied citizenship on the grounds of their race. The apartheid government decided that specific ethnic groups should be citizens of very small pieces of land known as "homelands," and these ethnic groups were not allowed to live in the rest of South Africa. These ethnic groups, which were entirely constituted of people categorised as "black" according to apartheid laws, made up more than 80% of the country's population. However, only 15% of the land was allocated to them. (For information about how land was distributed in South Africa, see this fact sheet prepared by PLAAS, the Institute for Poverty, Land and Agrarian Studies.)



Source: Bantustan boundary data from the Directorate: Public State Land Support via Africa Open Data (https://open.africa/en/dataset/former-tbvc-states-shape-file) with Creative Commons Attribution-Share Alike 3.0 Unported License.

South Africa Provinces and Homelands in 1994

These homeland governments, although described by the apartheid government as "independent," were not recognised by any other countries; because they were considered to be "puppet governments" who were aimed at furthering the goals of apartheid. Citizens of the homelands had no right to work or live in South Africa and had to carry "passes" which acted as passports while within South Africa. The right to one united citizenship within the borders of South Africa is therefore a hard won right to be celebrated.

Citizenship is the gateway to many other rights, including political rights (discussed above) and the right to freedom of movement.

Requirements for Citizenship

South African citizenship can be acquired in various ways. First, you have a right to be a citizen if you are born to a South African parent, or if you are legally adopted by a South African parent. Second, you acquire the right to become a citizen through naturalisation – from living and/or working in South Africa for an extended period of time. You would first get permanent residence, which can then lead to naturalisation. For this, there are a number of requirements and ways to become a citizen. The main factor is that you need to have a permanent residence permit and have spent five years actually living in the country. For more details on the requirements of citizenship, please see the South African Citizenship Act of 1995 with its 2012 updates.

Refugees

If you have come to South Africa because you have been, or fear being, **persecuted** in the country you have come from, you can apply for refugee status. Refugee status should be granted on the basis of, for example, persecution based on your race, religion, nationality, political opinion, or a membership in a particular social group, race, gender, culture, ethnicity or sexual orientation and if you fear for your safety.

You can also apply for refugee status if you were forced to leave your country because of serious disturbances or disruptions to the public order in a part or the whole of your country.

Lastly, you can apply for refugee status if your husband, your wife, your parents on whom you depend, or your child is in South Africa because they are seeking refugee status.

Refugees have most of the same rights as citizens in South Africa (except, for example, for political rights). This is in accordance with South African international law **obligations** in terms of the 1951 Convention Relating to the Status of Refugees Convention and in terms of South Africa's Refugees Act.

If you plan to apply for refugee status, as soon as you come into the country you should approach a Refugee Reception Office (RRO) and tell them that you are an asylum-seeker to seek asylum. Once you have registered as an asylum- seeker, you will be given an asylum-seekers permit, which means that you are lawfully in the country and are in the process of having the Department of Home Affairs determine whether you are a refugee.

Before you have received the permit, you may be arrested for being present in the country without documentation that entitles you to reside in South Africa. However, it is very important to remember that even if you are in the country without these documents, you are still entitled to your constitutional rights.

If you are arrested before you have reached a RRO to apply for asylum, you must tell the police that you want to apply for refugee status, and they must help you to do this. As soon as you have explained to the police that you want to apply for asylum, they cannot arrest you. They should issue you with a 14-day transit permit and give you an opportunity to apply for asylum. When you have your permit, you should try and get someone to make a certified copy of it that is not older than three months and always keep the copy on you in case you are asked to produce it or if you get arrested. You will have to renew your permit until you are called back to the RRO for your interview for refugee status. At the interview, you need to explain why you cannot return to your country of origin. If you can bring any evidence of your story, such as newspapers articles, photographs or documents, you should, but it is not a requirement. You should also try and explain your story in as much detail and as honestly as you can. You are entitled to an interpreter who can translate your story accurately in the interview.

If your application for refugee status is rejected as "unfounded", you have the right to an appeal and you should lodge a notice to appeal within 30 days of being rejected. If your application is rejected as "manifestly unfounded" or "fraudulent", you are not entitled to an appeal; but within 14 days of the rejection, you should make submissions on why the decision to reject you was wrong. You should hand it in at the office in which you applied for asylum, and obtain proof you handed it in – such as a stamp on your own copy. It is a good idea to approach a lawyer to assist you with your appeal.

Foreign Nationals in South Africa

There are various reasons for people who are not South African citizens to be in South Africa- including if they are visiting, working in South Africa or if they are seeking asylum.

In the last 30 years, there have been numerous severe and violent attacks on foreign nationals living and working in South Africa and on their property. People have been brutally killed and driven out of their homes, simply because they are not South Africans.

Major periods of intense attacks of this nature have happened in 2008, 2015 and 2022. These attacks are commonly referred to as being motivated by "xenophobia" – a fear of or prejudice against

people based on their foreign nationality. The Constitution firmly prohibits all such discrimination, whether violent or non-violent, by entrenching a right to equality which specifically indicates that discrimination based on "ethnic and social origin" is unconstitutional.

Most of the other rights in the Constitution apply to "everyone". This includes refugees, asylum seekers, permanent residents and everyone else who is in South Africa. Everyone has the rights to dignity and to equality, regardless of nationality, economic status and race. Everyone is also entitled also to the right to freedom and security of the person, rights of arrested, rights of detained and accused persons and socio-economic rights such as access to healthcare services, education, food, water and housing.

CASE STUDY: XENOPHOBIA

For years, Margaret Maushe, a Zimbabwean immigrant and wheelchair user, had called Ellis Park in Doornfontein, Johannesburg, her home. But in December 2022, her life was turned upside down when she was forcefully evicted by Operation Dudula, a South African nationalist group that claims to fight illegal immigration but has been widely criticised for its anti-immigrant vigilante tactics.

Margaret, along with hundreds of other immigrants with disabilities, was driven from her home. With nowhere to go, she found temporary shelter in a cramped and unsafe building in the city center. "Everything was lost during the eviction," she said. "Now I sleep with my children in a room with many others."

Her story is one of many that reveal the growing xenophobia in South Africa, where immigrant communities face increasing hostility. Human rights organisations have condemned Operation Dudula's actions, calling for stronger legal protections for vulnerable people like Margaret.

THE RIGHT TO FREEDOM OF MOVEMENT

Section 21 Freedom of movement and residence

(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

South Africa is made up of nine provinces and is home to over 64 million people. All people in South Africa have the right to move through around our country as they please and live in any province, city, town or village within it.

FLASHBACK: CONTROL OF MOVEMENT, THE 'DOMPAS' AND THE SHARPEVILLE MASSACRE

One of the cornerstones of colonialism and apartheid South Africa was the pass book. The pass book, also known infamously as the 'dompas', was used to control the movement of black people. Black people, were required to carry pass books when in urban areas, or places that were designated as being for white people only (including, for example, when travelling outside the homelands, discussed above in section 19 at p. 52).

Passes have a horrific history. Slaves in the Cape were forced to carry pass documents centuries ago. Under apartheid South Africa, a variety of laws were passed to control who was allowed in which areas, and when specific groups were allowed in such areas. These laws entrenched the exploitation of black people and segregation along racial lines. Black men had to carry a pass that gave permission to live and work in urban areas. If a black man was in an urban area without a pass, he would be arrested. This clearly undermined people's ability to move freely within the country. The pass law system also restricted work opportunities and separated countless families.

An extract from the autobiography of Bloke Modisane, a journalist, writer and actor, shows some of the terrible effects of the pass laws:

> *'This is the essence of the Pass Law.*
>
> *I cannot sell my labour to the highest bidder.*
>
> *I cannot live in the residential area of my choice; I am committed by the colour of my skin to live in segregated ghettos or locations or slums.*
>
> *Freedom of movement is restricted by the Reference Book.*

> *The right to live in peace in my house is subject to the pleasure of any superintendent or Native Commissioner who is empowered to endorse me out of the municipal district if, in his opinion, my presence is a danger to public peace and good order.*
>
> *This is the law.'*

Struggle movements resisted pass laws through mass action and protest. On 21 March 1960, the Pan Africanist Congress staged a protest and mass march opposing the evil of the pass laws in Sharpeville. The apartheid police opened fire on the protestors killing 69 people. 180 more were injured, with many of the protestors shot in the back as they tried to flee police violence. Today, the 21 March is Human Rights Day, a public holiday in South Africa to commemorate the Sharpeville Massacre and the struggle for human rights.

The right to freedom of movement also includes everyone's right to leave the country. Only South Africans citizens have an unrestricted right to enter the country. Citizens have the right to a passport which gives them the ability to travel to other countries.

Freedom of movement also can be justifiably limited. Although you may move wherever you wish, the law prevents you from entering private property without permission. Another restriction on your freedom of movement is if you are convicted of a serious crime, you can be imprisoned, and your movement will be restricted. Laws about trespassing and imprisonment limit our right to freedom of movement; but, they are justifiable, given that the government passes these laws in the interests of society as a whole. See Chapter 2, Section 36 of the Constitution to learn more on Limitations of Rights.

RIGHTS OF ARRESTED, DETAINED AND ACCUSED PERSONS

Section 35.

(1) Everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

"No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

Nelson Mandela

Source: John Mathew Smith & www.celebrity-photos.com https://www.flickr.com/people/36277035@N06 with Attribution-Share Alike 2.0 Generic license.

People who are arrested or imprisoned are vulnerable because their bodies are placed in the control of the state which keeps them confined to specific physical spaces in prisons and determines what they can and cannot do. During **apartheid,** many people were imprisoned in terrible, degrading and unsafe conditions for long periods without trial or access to legal advice. The Constitution aims to protect prisoners also against this abuse.

The **Constitution** says that accused, arrested and detained persons must be treated fairly and with **dignity.** If the police or correctional services abuse their power they are committing human rights violations. The Constitution has a detailed list of rights protecting arrested and imprisoned people. These are to ensure that abuse of power does not happen and that innocent people are not imprisoned. This list is very long – so we will not cover them all here – but they include:

The right to be presumed innocent: even if you are arrested and charged with a crime you are presumed to be innocent until you have been proven guilty in a court of law.

The right to remain silent: when a person is arrested, she has the right to remain silent, meaning that the police cannot force her to say something that can be held against her later. The police must also inform her of this right.

The right to a lawyer: All people accused of crimes have the right to legal representation. If you cannot afford a lawyer and you are accused of a crime, the government must make sure that a lawyer is appointed to assist you for free.

The right to be informed why you are being detained: The police who are detaining you must tell you why they are detaining you.

The right to detention under conditions consistent with your human dignity: You may not be detained in inhumane conditions. For example, you must be provided with food, water, access to toilets and healthcare services.

The right to a fair trial: If you are accused of a crime, you must be brought in front of a court within 48 hours of arrest (not including weekends). This is to make sure that you are being treated fairly and humanely in jail and determine whether the accused person should be detained or allowed bail pending a full, proper trial.

READ:

‘Since she started drinking again, Mavis’ life has become out of control. Her younger sister, Noluvuyo, has to look after her children, but she is trying to study for matric. When

Noluvuyo comes home to find Mavis has gone missing, all of their lives are about to change…'

To read this story, *Prison*, by Sicelo Kula, also available in Afrikaans as *Tronk*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/prison/

FLASHBACK: LEARNING ABOUT THE PAST, MOVING INTO A BETTER FUTURE

The **apartheid government** passed many laws that made it legal to hold people in jail before having a trial or often even before speaking to a lawyer. They did this so that they could arrest people who opposed the government, who they labelled as terrorists. Sometimes someone would be let out of jail after the 90-day limit provided for by these laws, only to be rearrested immediately right outside the prison gates! Many people also died in jail because of the injuries inflicted on them because they were tortured.

Steve Biko, the founder of the Black Consciousness Movement in South Africa, was driven naked from Port Elizabeth to Pretoria in an open bakkie in 1977 after having been tortured. He died from his injuries and the police claimed that he had inflicted them on himself.

Chris van Wyk's famous poem "In Detention" highlights the injustices done to prisoners by the apartheid government, by drawing our attention to all of the different excuses government officials gave for deaths of prisoners while in custody of the state.

He fell from the ninth floor

He hanged himself

He slipped on a piece of soap while washing

He hanged himself

He slipped on a piece of soap while washing

He fell from the ninth floor

He hanged himself while washing

He slipped from the ninth floor

He hung from the ninth floor

He slipped on the ninth floor while washing

He fell from a piece of soap while slipping

He hung from the ninth floor

He washed from the ninth floor while slipping

He hung from a piece of soap while washing.

The rights of accused that are strongly entrenched in our Constitution today are there to ensure that no prisoners will be treated in this way again.

The Judicial Inspectorate of Correctional Services (JICS) has a mandate to uphold and protect the rights of all detained people in the country. JICS conducts independent oversight of the Department of Correctional Services and receives and investigates complaints. Complaints can be sent to complaints@jics.gov.za.

PRIVACY

Section 14.

Everyone has the right to privacy, which includes the right not to have–

(a) their person or home searched;

(b) their property searched;

(c) their possession seized; or

(d) the privacy of their communications infringed.

Your personal information is yours to control. No one has a right to know this information or to make it known to others without your permission. Information about yourself could be something to do with your body (like your HIV status), where you live or details of your personal relationships. It could also be something to do with your political views, like being a member of a trade union or political party.

Thinking about our rights: *Do politicians have the same right to privacy as everyone else, or should we be able to know about their personal relationships and finances?*

There are times when other people might need your information. For example, your doctor needs

to know if you have any illnesses so that they can give you the correct treatment. Though the **Constitution** and other laws protect your choice about whether to share this information, it makes sense to give it to the doctor. However, when you do so, the doctor may only share that information with other healthcare workers, and only if this is necessary for your treatment.

An **employer**, your school, or a shop might also need you to give them certain kinds of personal information for good reasons. In these situations, it would not be very helpful to refuse to give these people your information. Again, the condition for giving them information is that they can only use it for the reason that you gave it to them. They cannot give it to companies who want to contact you to sell you something, nor can they publish it in a newspaper unless you have agreed to let them do so.

Your right to privacy, like all other rights, can only be **limited** for good reasons and through a law that applies to everyone equally. For example, if the police have a reasonable suspicion that you are hiding information that is being or has been used to commit crimes, the law allows them to search you, your car or your house once they have followed the proper procedure. Usually this will require the police to have a warrant. A warrant is a signed legal document which a judge can give to the police to say that they are allowed to search you or take your property. The police will first have to persuade the judge that they have good reasons for thinking that the information that you have will help them with a criminal investigation.

Protection of Personal Information Act

The Protection of Personal Information Act (POPI Act) is South Africa's data protection law, designed to uphold individuals' right to privacy by regulating how personal information is processed by both public and private groups. Fully enforced since 1 July 2021, the POPI Act mandates that personal data must be collected, used, stored, and shared responsibly and transparently.

Under the POPI Act, personal information can only be processed under specific conditions, such as with the individual's consent, when necessary for contractual obligations, compliance with legal requirements, or to protect legitimate interests. Organisations are required to appoint an Information Officer responsible for ensuring compliance with the Act.

Individuals have several rights under the POPI Act, including the right to access their personal information, correct inaccuracies, and object to its processing. The Act also imposes strict penalties for non-compliance, with fines reaching up to R10 million or imprisonment for certain offenses.

CASE STUDY: PRIVACY AND HIV TESTING

Mr G lived in a small town and knew his doctor socially. One day he had an HIV test as part of a medical assessment and discovered that he was HIV positive. Mr G was surprised and upset when he learnt his HIV positive status and asked his doctor not to tell anyone about it. A few months later the doctor was playing golf with some other medical professionals in the town, and he told them about Mr G's status. Soon many people in the town knew, and Mr G was very angry because his doctor had breached his right to privacy. He decided to sue his doctor, and the Supreme Court of Appeal held that the doctor had no right to share a patient's private information. The Court said that patients would be scared to tell doctors their HIV status if they feared that doctors would "squeal on them".

The same is true for interactions with clinic staff. If a nurse takes your blood for an HIV test, the test must be done in private and not in front of other people. The test's result is private and should remain between you and her unless she needs to tell another doctor for the purposes of improving your health.

The judgment: *Jansen van Vuuren and Another NNO v Kruger* [1993] ZASCA 145

PROPERTY

Section 25.

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

> ***(a) for a public purpose or in the public interest; and***
>
> ***(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.***

(3) The amount of the compensation and the time and manner of payment must be just and

equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

"South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry."

Chief Justice Mogoeng Mogoeng in *Agri South Africa v Minister for Mineral and Energy* 2013 (4) SA (CC)

The History of Property in South Africa

All over the world, the ownership of land and property more generally has been, and still is, linked strongly with political, social, and economic power. In South Africa, for a very long time, strong restrictions were placed on the rights of black, Indian, coloured people and women to own property in certain areas or at all. For example, **apartheid** laws prevented black people from owning land and businesses in areas where these properties would be most valuable. The law, therefore, acted in favour of white people's control of property and thus gave them wealth and power.

The Natives Land Act 27 of 1913 and the Development Trust Land Act 18 of 1936 were the laws that created a system called Grand Apartheid. These laws set aside specific areas of land just for black people to live on, while all other land was given to white people. The land designated for black people was very small, only about 13% of the total land, despite them making up more than 80% of the population. The rights black people had to the land were limited. In other words, they did not fully own it, and much of it was controlled by the government for the tribes living there. Because there was not enough for the growing population, many black families struggled to survive. They could not expand or develop the land they had, and there were not enough resources, like transport and markets to help them improve their situation.

The inequality in control and ownership of property was so severe after 340 years of **colonialism** and **apartheid** between 1652 and 1994 that by the time of South Africa's first democratic elections, groups controlled by six white families dominated the South African economy and over 80% of the

land in the country was under the control of the small white minority in the country.

The way in which the **Constitution** deals with property should be understood in this context. The first important thing to note is that the **Constitution** does not state that everyone has the right to ownership or property. It does, however, protect the ownership of property by affirming that no one may be deprived of property **arbitrarily**. This is to prevent the kinds of forced removals that occurred under **apartheid** where black, Indian and coloured were forcibly uprooted from certain areas, without compensation, so that white people could occupy those areas. According to the property clause of the **Constitution** and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, a law that has since been passed by **Parliament**, people cannot easily be evicted from property on which they live except by an order of a court which takes into account their life circumstances.

The second important thing which the **Constitution** does in the property clause is to empower and require the state to take measures to change the distribution of property in South Africa. The Constitution requires the **government** to pass laws that make land available to all people on an equitable basis and to return land or compensate those whose land was taken away from them during apartheid or before then for discriminatory reasons.

The Constitution also allows the government to "expropriate" or take away property from any person for public use, or where it is necessary to give property to those in need. In 2024, the Parliament passed the Expropriation Act 13 of 2024, a law to create clear rules on how such land may be taken away by the government. This law explains the process for taking the land and ensures that people are paid fairly when their land is taken away. It also makes sure that land is not taken from owners unfairly and that there is a good reason for doing so.

If your property is taken away from you completely by the government, for example, to build a school on your land, this may amount to what is called '**lawful expropriation**'. Government officials cannot decide to take your property away whenever they want to, and they must follow the correct legal processes. You also have the right to challenge the decision in a court.

When the government is considering expropriation, the Constitution and the Expropriation Act require it to compensate fairly the person from whom the land is being taken away. When determining the amount to be paid, these laws require the government to strike a balance between the interests of the public and those affected, including the owner. The government is also expected to have regard to other circumstances such as how the property was being used by the owner, the history in which the property was obtained, the market value of such property, the amount that they government

might have contributed in buying such property, and lastly the reason why it wants to expropriate the property.

> "One of the notorious acts of inhumanity of the twentieth century has been the forced removal of at least three-and-a-half million people by the South African state. These removals have been implemented under sweeping powers conferred upon officials by a compliant legislature... Even if forced removals are suspended in the future, the fundamental question of how to redress the injustices of centuries of dispossession will remain"
>
> – Former Constitutional Court Justice Kate O'Regan in 1990.

CASE STUDY: FORCED REMOVALS

In the 1960s the **apartheid** government passed several laws that restricted areas of land to certain racial groups. Ms Florence lived in a house with her family for almost twenty years. Her family had bought the house from the previous owners who were white in 1959. In 1957, the area that the house was in was classified as a whites-only area, but the Florence family, who were classified as coloured under apartheid law, managed to keep living there until they tried to register the property in their name in 1970.

Ms Florence's family was evicted and forced to sell the house back to the previous white owners at less than 10% of its value. In 1995 once Land Restitution **legislation** had been enacted to give effect to the property clauses in the Interim Constitution, the Florence family applied to have their property restored. Because the property had now been developed into an office block, the family could not be given back their house. So, the Florence family was awarded financial compensation instead, as confirmed by the **Constitutional Court**. The amount of compensation awarded was the value of the property as it had been in 1970 but adjusted to reflect present-day prices.

Thinking about our rights: *What do you think? Should compensation be based on the present-day value of a property, or the amount that it was worth when the people were evicted from it?*

Activating Your Rights

If your family or your community had land taken away from it after 19 June 1913 because of racially

discriminatory laws (such as the Natives Land Act or the Group Areas Act, or a law that was indirectly discriminatory), you may apply to have the land restored or to get the value of the money returned to you. To lodge a claim, you need to fill out a form at your nearest Land Claims Commission office.

National Commissioner: (012) 312-8883/9229/9754/9687

What Does Property Include?

Land is not the only kind of property. Property is anything that you can own. Land, cars, clothes, furniture and goods in a shop are all capable of being property. Today, with new kinds of technology and inventions, property is also more complicated. For example, if I am a musician and I compose a song which I then record, then I can own that song – it will be my property even though it is not a physical object. It is also possible to own ideas as property in a similar way. This means that if I discover the cure to a disease, I can register a patent on it and then I will own the use of the idea. If someone else wants to use my patented property, they will need my permission, and they might need to pay me some money.

CASE STUDY: INTELLECTUAL PROPERTY RIGHTS AND THE PUBLIC INTEREST

Aventis is a drug company that had a patent on a medicine called docetaxel – a treatment for several forms of cancer. When a company makes a product that is patented by another company, it is called a generic. Generic medicines are extremely important for society, because they are generally much cheaper than patented medication.

Cipla, another pharmaceutical company, started producing the same medicine and selling it more cheaply as a generic, but did so without permission from Aventis. Aventis took Cipla to court for infringing its patent. The court found that public interest factors such as the risk to public health are relevant in deciding whether a patent can be infringed. (Access to medicines is part of the right to healthcare which is discussed in more detail on p. 113). For example, if the generic medicine is already being taken by many people to treat their illness, it will not be in the public interest for a court to stop the company from selling that medicine. This is a good example of how property rights must be balanced against other rights when such rights are in conflict.

The judgment: *Cipla Medpro (Pty) Ltd v Aventis Pharma SA, Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* [2012] ZASCA 108

Another good example of the balance of intellectual property rights concerns access to reading material for blind and visually impaired people. Blind SA is a National Disabled People's Organisation for blind people, which facilitates and promotes the dignity and independence of blind and visually impaired South Africans. The legal battle ensued because people who are blind and visually impaired have suffered from a shortage of reading materials for decades in South Africa, which has violated their rights to equality, dignity, basic education, and the right to participate in the cultural life of their choice.

In 2022, Blind SA brought a case in the Constitutional Court challenging some sections of the Copyright Act 98 of 1978, a law which provides legal protection for original literacy, musical, artistic, and other creative works. This law contained some sections that criminalised anyone who converted reading materials into accessible formats (such as Braille) without the permission of the copyright holder. The Constitutional Court ruled in favour of Blind SA and ordered Parliament to correct defects in the Copyright Act within 24 months. Alongside this ruling, the Court also made a temporary exception (13A Exception) for blind and visually impaired people, and that this exception be read into the Copyright Act while Parliament was correcting the defects. This 13A Exception provided temporary rules to guide on how reading materials could be converted into accessible formats for blind and visually impaired people without the permission of the copyright holder.

On 29 February 2024, the Parliament finished correcting the defects and approved the Copyright Amendment Bill (CAB), and sent it to the President for signature. The CAB contained section 19D, which allows authorised organisations and individuals to create and share accessible copies of copyrighted works without needing permission from the copyright owners, as long as they follow specific rules. These rules include having legal access to the original work, using it in a way that respects its integrity, not making a profit from it, and giving proper credit to the original creator.

The President failed to sign the CAB by the deadline. This meant that the Court's temporary 13A Exception had expired, and it was no longer clear how reading materials could be converted into accessible formats for blind and visually impaired people without the permission of the copyright holder. Without CAB being signed into law by the President, South Africa also could not sign the Marrakesh Treaty, an international law that would allow many materials to be accessible through

cross-border exchange.

As a result, Blind SA made an urgent application in the Constitutional Court in October 2024, for the Court to compel the President to sign the CAB or to at least revive the Court's temporary 13A Exception. Thereafter, the President referred the CAB to the Constitutional Court, and then Blind SA required that the 13A Exception must remain in place until the CAB is signed into law to prevent a legal gap or uncertainty. On 13 December 2024, the Constitutional Court agreed with Blind SA and made a temporary order reviving its 13A Exception. On 7 May 2025, the Court made its final order, declaring that the matter was urgent, and ordered that section 19D of the CAB be immediately read into the Copyright Act until the CAB is passed into law. This case is another example that shows that property rights, including intellectual property rights, must be balanced against constitutional rights, especially when vulnerable groups are affected.

The judgment: *Blind SA v President of the Republic of South Africa and Others 2025* (7) BCLR 757 (CC)

WORKING RIGHTS AND WORKERS RIGHTS

Section 13. Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

Section 23. Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right -

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

The **Constitution** does not give all people the right to a job. It does however require the **government** to take steps to create job opportunities for people who were previously and presently disadvantaged because of discrimination. In addition, the government's **obligation** to provide education for people, if done effectively, should equip people in South Africa with the ability to find jobs more easily. It is difficult to see how we can enjoy many of the other rights in the Constitution if there are no working opportunities for us, since in the economic and political system we live under, we need money both to survive and to thrive. Once you have a job, the Constitution and other laws passed by **Parliament** give you, as a worker, many rights relating to the way you must be treated. The purpose of these rights and laws is to protect you from abuses by your employer who is very often in a position of power over you. The law protects job-seekers too, for example from hiring practices that are unfairly discriminatory. The law also gives protections to employers.

FLASHBACK: UNIONS IN OUR HISTORY

Labour unions and workers parties played a key role in the resistance against the apartheid government. Workers banded together and argued that it is often the imbalance in both political and economic power that results in the oppression of poor people.

This was particularly true of poor black people in South Africa who were exploited for their labour on mines and farms and in factories, and often also in white people's own homes as gardeners and domestic workers. The struggle against racism has often coincided with a struggle against a class-based society. Class, like race, is a means that can be used by government and elites to keep workers

and poor people down. Even as apartheid was coming to an end, Chris Hani – then the head of the South African Communist Party – strongly expressed the clear connection between political, economic and social change and protecting workers rights:

> "Everybody would like to have a good job, a good salary... but for me that is not the be-all of struggle. What is important is the continuation of the struggle. The real problems of the country are not whether one is in Cabinet... but what we do for social upliftment of the working masses of our country."

Chris Hani, widely considered one of the greatest icons of South Africa's resistance movement, was assassinated about a year before South Africa's first democratic election in 1994. Unions remain important in protecting the rights and interests of workers in South Africa, and continue to operate in a context where workers' rights are often undermined.

The Right Not To Be Forced To Work, or Enslaved

The Constitution strictly prohibits forcing anyone to work or using people as slaves. No one can own you or force you to do work that you do not want to do, no matter what you owe them, what your relationship is with them or who you are. This also means that you must be paid for the work that you do.

CASE STUDY: DOMESTIC WORKERS

A particularly vulnerable group of workers are domestic workers. Domestic workers are an important part of South Africa's labour force, with almost 1 million people working as domestic workers. The history of domestic work in South Africa is steeped in injustice and unfairness, because of racial, gender and class inequality. There is a minimum wage set for domestic workers, and it is illegal to pay a domestic worker anything lower than that. Although the minimum wage has been increased to R28,79 per hour as of 1 March 2025, it is still low considering cost of living. This wage extends to asylum seekers and refugees who, upon getting official status as a refugee or asylum seeker are entitled to look for work and be employed at minimum wage. For more information on the minimum wage and the sectors that it applies to, please consult the amended Act available at: https://www.gov.za/sites/default/files/gcis_document/202502/52053rg11792gon5830.pdf

As of 2020 domestic workers are covered by the Compensation for Occupational Injuries and Diseases

Act (COIDAA) which means that should they be harmed or fall ill due to work required by their employment, they are entitled to compensation from the Compensation fund or their employers. Issues regarding wages or social security like COIDA can be brought to the local Department of Education and Labour or the Commission for Consolidation, Mediation and Arbitration (CCMA).

COIDA and all of its amendments can be found at: https://www.gov.za/documents/compensation-occupational-injuries-and-diseases-act

While more information on the services offered by Department of Employment and Labour under CODIDA are explained in the services book provided by the department at: https://www.labour.gov.za/DocumentCenter/Publications/Compensation%20for%20Occupational%20Injuries%20and%20Diseases/COIDA_SERVICE_BOOK_VERSION_23.pdf

Code4SA, a non-profit organisation that promotes social good through using data, has created a new tool called Living Wage, to help employers figure out if they are paying their domestic workers a fair amount. To find out more, visit http://livingwage.code4sa.org/.

The Right to Freedom of Trade and Occupation

Section 22.

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

In addition to the right to fair labour practices, the Constitution says that citizens have the right to choose their trade, profession or occupation freely. This does not mean, however, that the government cannot regulate professions. The government can create requirements and standards that professionals must comply with, in order to participate in a trade, profession or occupation of their choosing.

This is particularly so for professions which are potentially dangerous or provide access to services and goods that are protected by rights in the Constitution or are important to society. For example, the law creates strict rules about what qualifications are required for you to become a doctor or a lawyer. There are clear standards that all doctors and lawyers must meet to do their work. This is particularly important because both access to Courts (which is almost impossible without lawyers)

and access to healthcare services (which requires doctors) are vital for a well-functioning society and rights protected by the Constitution.

Balancing Rights: Patients and Doctors

When a profession relates to a service that is constitutionally protected, or impacts on another person's rights, it is important that it is carefully regulated. A good example is that of health professionals (doctors, nurses and other health workers) who provide medical services. In this instance, the health professionals' right to freedom of occupation must be balanced against the patients' rights to healthcare.

For example, the Health Professions Act allows a board to publish guidelines for the fees that should be charged for certain health services. This helps patients know how much they should be paying. The Act also says that, to register, certain healthcare professionals have to do a year of community service. These are two **limitations** on healthcare professionals' rights, because they restrict how much they can charge for their services, and they cannot practice without having done community service. This makes sure that patients do not have to pay too much money to access their right to healthcare and makes sure that all medical professionals spend some time working in hospitals where they might otherwise not work, so that a wider range of people have access to medical attention.

A law which may have the same effect in the legal profession – the Legal Practice Act – has recently been passed by **Parliament**. At the moment the legal profession is regulated by various laws and rules of professional lawyers' societies. One type of lawyer, an attorney, is presently required to do 40 hours of community service or pro bono work per year while people training to be attorneys are required to do 8 hours. The Legal Practice Act 28 of 2018 also requires that all legal practitioners and candidate legal practitioners be a South African citizen or a permanent resident of the Republic.

Should you wish to read more on the framework provided by the Act please visit: https://www.gov.za/documents/legal-practice-act

The site contains a copy of the document as well as its amendments amongst other information on the Act.

The Right to Fair Labour Practices

Everyone who works has the right to fair labour practices. Everyone has this right – it is not dependent on whether you are a citizen of South Africa or a foreign national. **Parliament** has passed several

important laws explaining the meaning of this right and detailing the power it gives you in your relationship with your employer. One important law which does this is the Labour Relations Act.

The Labour Relations Act, unlike the Constitution, specifies different types of rights for people in different forms of employment. Although your rights therefore vary depending on what your employment relationship is – "employees" have more protection in terms of the law than "independent contractors" or outsourced workers – the right to fair labour practices protects all workers. The Constitution specifically explains that the right to fair labour practices includes the rights to form unions, to participate in union activities, to strike and to have your union take part in collective bargaining on your behalf with your employer or employer's organisations.

All workers have certain minimum rights. The Constitution, in addition to entrenching a right to fair labour practices for "everyone" specifically also gives workers the right to form and join trade unions, to participate in these trade unions and to strike. The Labour Relations Act further affirms these rights while making additions like the distinction between fair and unfair labour practices and the creation of avenues for dispute resolution such as the Commission for Conciliation, Mediation and Arbitration (CCMA).

The minimum rights which any employee is entitled to are set out in the Basic Conditions of Employment Act (BCEA). The BCEA applies to most employers and workers but not to independent contractors. Here are some examples:

- You must have a break that is at least 30 minutes long for a meal during the day.
- Women are entitled to four months maternity leave (this does not have to be paid).
- All employees are allowed 36 days of sick leave over a three-year period. This sick leave is paid leave.
- Employees cannot work more than the maximum of 45 hours of ordinary work per week.

The Labour Relation Act prohibits unfair labour practices which are any unfair acts or omissions that happen within the workplace. This includes unfair conduct of an employer relating to the promotion, demotion or probation of an employee.

If you think you have been dismissed unfairly, you must launch your case within 30 days of the dismissal. If you have been subjected to unfair labour practices you have 90 days from the moment that you become aware of the practice to bring it to the attention of the CCMA. You can contact the Department of Labour at any point if you have questions, or are not sure who to approach. The

CCMA also has a lot of easily understandable information available on its website should you want to understand how these processes and your labour rights work.

Department of Labour public employment hotline: (086) 010 1018 or email them at: pescontactcentre@labour.gov.za or pes@labour.gov

The CCMA's website is http://www.ccma.org.za/ and you can contact its national office on (011) 377 6650/6600. It also has offices in each province.

The Right to Equitable Employment

The Employment Equity Act (EEA) aims to overturn the inequality that cannot be removed through the removal of apartheid laws that allowed for discrimination in the workplace. Laws and policies like those under apartheid, although no longer applicable, have created lasting social and employment inequalities. As such the EEA aims to ensure that everyone has an equal opportunity to find and maintain employment regardless of their race, gender, ethnicity and economic position.

The EEA affirms the constitutional right of equality and true democracy through the creation of an environment of non-discrimination in the workplace. It covers all employees and employers in South Africa, except for the South African National Defence Force, the National Intelligence Agency and the South African Secret Services.

In addition to prohibiting discrimination on the grounds outlined in the Constitution such as race, gender or religion, the EEA also prohibits discrimination on the grounds of political opinion, family responsibility and HIV status, amongst others.

If an employee believes that they have been discriminated against by an employer based on any of the grounds outlined in the EEA, they can raise a dispute with the CCMA within 6 months of the alleged discrimination taking place. The burden of making sure that the dispute is fair is placed on the employer.

On top of this, the EEA also sets the groundwork for affirmative action within the workplace. With its aim to create equality within the workplace, the EEA requires that employers who employ more than 50 workers must take the needed steps to include and advance previously disadvantaged groups. This means that should there be new appointments or promotions of staff, employers must consider properly qualified people from disadvantaged backgrounds first.

For more information on the EEA and its amendments visit the official South African Government site: https://www.gov.za/documents/employment-equity-act

The Right to Safety and Dignity in the Workplace

The Occupational Health and Safety Act (OHSA) gives employees specific health and safety rights, giving employers health and safety guidelines for the workplace, and gives inspectors the power to enforce these regulations. OHSA covers all employees including farm workers, domestic workers and state employees.

Under this Act, both employees and employers hold the responsibility of ensuring that health and safety guidelines are followed. Employees must:

- Take reasonable precautions for their own health and safety;
- Follow rules and regulations;
- Report unsafe circumstances or accidents that occur to the allocated safety representatives; and
- Avoid reckless and/or damaging behaviour as they can be held liable for such.

Employers have general duties that include but are not limited to:

- Ensuring that the workplace is a safe and healthy environment such that an employee is not allowed to do potentially dangerous work;
- Issuing the appropriate protective equipment where needed;
- Having a clearly designated safety representatives;
- Making sure that dangerous equipment is in good working condition and is safe to operate; and
- Reporting of accidents and health and safety issues to the Department of Employment and Labour.

OHSA also offers protection to employees from their employers. Should employees be placed in a position that requires them to give information about unsafe working conditions in their workplace, give evidence in court or respond to a request by the inspector, their employer cannot take any action against them.

For more information on OHSA and its regulations and amendment visit: https://www.gov.za/

documents/occupational-health-and-safety-act

The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace is an acknowledgement by the South African state that all forms of harassment are unfair discrimination.

The Code defines harassment as intentional and unintentional conduct that:

- Is unwanted;
- Creates a hostile or unsafe work environment such that there is an emotional, physical or psychological effect on the employee's mental health or well-being; and
- Is related to the prohibited grounds of discrimination in the EEA.

Harassment under the Code includes sexual harassment, gender-based violence, bullying, racial/ethnic or social origin harassment as well as physical, psychological, emotional and sexual abuse. It also extends to include the use of physical force or power to pose a threat that ends in the high likelihood of social injustice, economic harm, injury, death, physical and/or psychological harm or stunted development.

This Act applies to all sectors, both formal and informal, employees, employers and trade unions.

The Code requires that all employers have a zero-tolerance policy to any form of harassment and places responsibility on the employer or trade union to prevent harassment. The Act also holds employers responsible indirectly for the wrongful acts of their employees if acts of harassment are committed during the course or scope of their employment.

For more information on the CODE please refer to: https://www.labour.gov.za/DocumentCenter/Code%20of%20Good%20Practice/Employment%20Equity/Prevention%20and%20elimination%20harassment%20in%20the%20workplace-English%20version.pdf

CASE STUDY: SEXUAL HARASSMENT IN THE WORKPLACE

Ms Ntsabo was a young woman in her thirties who worked as a security guard. During her shift, she was continually touched inappropriately by her supervisor, who also suggested that they have sex. This is sexual harassment. She lodged many complaints to her employers, but no action was taken. She eventually suffered a sexual assault from her supervisor and when her employer failed to do

anything about it, she had no choice by to resign from her job.

Ms Ntsabo took the matter to the Labour Court where the court said that where complaints of **sexual harassment** are made, they must be dealt with promptly by an employer. Ms Ntsabo's employer should have taken action and protected Ms Ntsabo from the harassment and later assault. The court therefore ordered that she be paid compensation for the money she would have to spend on counselling and for the harm caused to her dignity.

Ntsabo v Real Security CC (2004) 1 BLLR 58 (LC)

The Right to Strike

Striking involves workers together agreeing to stop work in order to protect workers' rights and interests. It is an important form of action because it helps workers to make a big statement about their unhappiness to employers who are often in positions of power around the negotiation table. Your right to strike is limited by some rules that you have to follow in order for your strike to be protected. The rules regarding a protected strike are similar to those for a **lockout**. A lockout is where an employer prevents employees from coming back to work for reasons usually associated with employees' action.

For a strike to be protected, your dispute must have gone to the CCMA, and you must have been issued a certificate that says that it could not be resolved. Thirty days must have passed since the certificate was issued, and you must give your employer 48 hours' notice of the strike. During a protected strike you may not be dismissed or have disciplinary action brought against you. If you are locked out illegally, you do not need to follow the procedure above in order for your strike to be protected. The same applies to lockouts in response to illegal strikes. If your employer changes your working conditions without consultation and refuses to change them back, you also do not have to follow the procedure for your strike to be protected.

What is most important is that before engaging in a strike, workers take care to ensure that they understand their rights in relation to their employers. If this is not done, workers may risk dismissal or disciplinary action which will be difficult to fight in. Being part of a union may help as it allows workers to join together in seeking more protection and benefits from their employers.

CASE STUDY: MARIKANA

The history of mining in South Africa is a history of exploitation, racism and inequality. Miners work for low wages in bad living conditions, with many threats to their health and safety. In August 2012, mineworkers at a mine owned by Lonmin, a mining company, went on strike demanding a wage increase. Management of the mine called the strike illegal because the mineworkers had not complied with the requirements for a protected strike. Although the strike did begin illegally, without any authorization from the leadership within the National Union of Mineworkers (NUM), on the second day of the strike a group of miners went to try and get the strike authorised. This attempt was met with violence from NUM. They shot and killed two of the striking miners. Lonmin called on the police to monitor the situation. Lonmin never directly or indirectly negotiated with miners.

On 16 August 2012 members of a special unit of the police opened fire on the striking mineworkers, killing 34 people and wounding another 78. In total throughout this period 44 people were killed. Journalists later reported that many victims were shot in the back, far away from police lines. The event is regarded as the worst incident of police violence since the end of **apartheid**. Despite the fact that the miners were the victims of forceful police action, initially 270 miners were arrested and charged with public violence and then murder, though these charges were later dropped. President Zuma appointed retired Judge Ian Farlam to chair a commission of inquiry into the tragic incidents at the Lonmin mine in Marikana.

In March 2015, the commission of inquiry released a report on the events that took place at Marikana. This report has been met with significant criticism. The report recognises that Lonmin failed to meet its obligations in terms of the Social Labour Plan (SLP). The SLP requires that mining companies make commitments to social and economic development, human resource development and providing their employees safe and liveable housing and living conditions. Lonmin failed to provide the miners at their company with safety both in the mine and in their lives outside of the mines. As such the report does state that Lonmin bears responsibility for the deaths and injuries suffered at Marikana, but it does not make suggestions as to how this responsibility translates to compensation to the families and miners affected.

The report also found that key people in power like Cyril Ramaphosa, who was the Deputy State President and a non-executive director of Lonmin at the time, were not directly responsible for the killings at Marikana. Rather the report recognises that they dealt with the situation poorly and should have pushed Lonmin into negotiations rather than using force. But ultimately, the report places

blame for the deaths and injuries at Marikana on the miners who suffered.

Bereaved families are still fighting for reparations.

To read more on the families fight for reparations visit: https://marikanajustice.co.za

FREEDOM OF EXPRESSION AND ASSOCIATION

Section 16.

(1) Everyone has the right to freedom of expression, which includes—

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to -

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Section 18. Everyone has the right to freedom of association.

Democracy is a system of **government** that is based on the will of the people. The idea is captured by a popular slogan "of the people, by the people, for the people". What this means is that for democracy to work, our representatives in government must know what we think. They are not the only ones who speak for us. We are also entitled to speak for ourselves.

It is important that people are allowed to debate, discuss and criticise policies, law, the actions of those in power and ideas with which we disagree.

When a government regime becomes oppressive or stops listening to people's demands, history teaches us that the first right they usually try to take away from people is the right openly to discuss and criticise the government. The rights discussed in this section all allow political action and the clear expression of the opinions of people. During apartheid the government restricted these rights severely and even banned organisations and artists that criticised them and their ideas. As a result,

these rights are jealously guarded by our Constitution today. The freedom to express ourselves is also central to our ability to freely express our feelings, emotions, desires and interests openly and without fear. Protecting and regulating the right to freedom of expression is important to ensure that we have a vibrant constitutional democracy where we can speak up and defend our rights.

Freedom of Expression

The right to freedom of expression protects our right to express ourselves and our views in a variety of ways, including through words (i.e. spoken, written or performed) and expressive acts (i.e. dance, song, drama, protest). The **Constitution** protects the expression of all people and also emphasises the importance of a free media, artistic and creative freedom and the freedom to conduct academic and scientific research. You also have the right to receive information and ideas.

READ:

> 'Dumi's a shy boy on a scholarship. He just wants to impress Alexa, his lovely classmate. But then things go horribly wrong – what was meant to be a private joke gets spread all over the internet. And now it looks like it will destroy more than just his chances with Alexa...'

To read this story, *But I Never Meant*, by Maire Fisher, also available in isiZulu as *Kodwa Bengingaqondile*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/but-i-never-meant/

As with all rights, however, this right can be limited. Some of the limits to free expression are considered so important that the Constitution specifically lists them. For instance, the right to free expression does not extend to attempts to convince people to start or participate in wars and acts of violence. It also does not protect words or acts which encourage people to hate and harm other people because of their race, ethnicity, **gender** or religion. Importantly, the **Constitutional Court** has indicated that the right to freedom of expression will be limited where people's rights to **dignity** and privacy are infringed by expressions that harm someone's reputation or causes them serious insult.

Press Freedom and Its Limits

The media plays an important role in keeping our democracy alive. The press and other media platforms enable robust debate on important political, economic and social issues. Through these platforms we are able to access important information that shapes our decisions including how we

vote, and hold those in power accountable.

Sometimes, journalists report on matters that are going on in the Courts, in keeping with the principle of open justice. This is the idea that justice must not only be done, but also be seen to be done. The media plays a vital role in advancing the principle of open justice. Reflected in the constitutional rights to a fair and public trial, open justice in practice has developed significantly over the years to permit the broadcasting and publication of court proceedings. It is becoming more and more common for courtroom proceedings to be televised in South Africa. Examples of this include the infamous murder trials of Oscar Pistorius and Henri Van Breda, who were each accused of murdering people close to them.

CASE STUDY: CENTRE FOR CHILD LAW AND OTHERS V MEDIA 24 AND OTHERS

In 1997, KL was abducted at birth by a woman who raised her as her own child until one day, her birth parents found her. Her 'mother' was arrested and a criminal trial was soon to follow.

As this all unfolded, KL had just turned 17 years old. The media was abuzz with stories about her and the trial. It was clear that journalists were not going to protect her identity at all - before, during and after the trial. The media insisted that they had done nothing wrong when they published stories that included details that could easily reveal her identity. Once she had testified, they insisted that her right to anonymity as a child witness would fall away as soon as she turned 18.

Section 154(3) of the Criminal Procedure Act clearly prohibited the disclosure of the identity of a witness or offender where such a person was a child (under the age of 18). However, the law did not say anything about children who were victims and would not or had not yet testified. Concerned by the overwhelming media interest in the matter and the risk of her identity being made public, KL challenged the constitutionality of section 154(3) of the Criminal Procedure Act on the basis that it provided no protection to child victims, who would not or had not yet testified during trial, and terminated that protection when they turned 18.

This case went all the way to the Constitutional Court, resulting in the law being changed to protect the right to anonymity for victims, offenders and witnesses in criminal matters, where such persons are children. The law is now designed to protect children who are affected by crime, even beyond the age of 18. So whilst the right to a free press is protected by the Constitution, media reporting must

be done in a manner that is consistent with the principle of upholding the best interests of the child, rather than sensationalising traumatic experiences with crime.

The judgment: *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46

CASE STUDY: LE ROUX V DEY

Attempting to make a joke, three high school boys created an image on their computers in which they pasted the faces of their principal and deputy principal onto a picture of two naked men sitting in a position that suggested they were having sex. They did this to mimic an episode of South Park, a cartoon show, which they enjoyed watching. The deputy principal took the two boys to court claiming that the image infringed upon his right to dignity.

The court agreed, finding that the publication of the image was defamatory and wrongful, and ordered the boys to pay the Deputy Principal an amount of R25,000 as compensation. The court reasoned that suggesting that someone is gay is not by itself an insult. However, in the context of the school the image made inappropriate and degrading suggestions regarding his sexual orientation in a way that made him the subject of ridicule and disrespect.

The judgment: *Le Roux and Others v Dey* [2011] ZACC 4

Thinking about our rights: *Is it important that children feel free to express themselves and experiment with ideas? Is there a difference between the importance of the right to free expression for children and adults?*

Hate Speech

CASE STUDY: QWELANE V SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS

In 2008 columnist John Qwelane published an article in the Sunday Sun titled 'Call me names - but gay is not okay'. He made statements comparing homosexual people with animals, designating them as the sole cause of moral degeneration in society.

His statements sparked outrage at a time when homophobic violence posed a heightened threat to gay and lesbian people. Over 300 concerned members of society wrote to the South African Human Rights Commission (SAHRC) to register their complaints. The SAHRC referred the hate speech complaint to the Equality Court based on the Constitution as well as the Promotion of Expression and Prevention of Unfair Discrimination 4 of 2000 (PEPUDA).

In the Equality Court, Qwelane decided to challenge the constitutionality of how hate speech is defined in section 10 of PEPUDA. He argued that it was too broad and resulted in an unjustifiable limitation of free expression. The High Court dismissed this application, affirming the limitation of conduct that amounts to hate speech, as in section 16(2)(c). The court ordered Qwelane to write an apology to the LGBTQIA+ community, and to pay the legal fees of the other party.

Dissatisfied with the outcome, Qwelane challenged the decision in the Supreme Court of Appeal. Ultimately, the Constitutional Court ruled that his article was advocating hatred against homosexuals on the basis of sexual orientation. The court upheld the order of the High Court, except for aspects of the judgment about the mandatory apology, because Qwelane had already passed away when the judgment was handed down in 2021.

The judgment: *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22

Assembly, Demonstration, Picket and Petition

Working with other people has the power to amplify the ideas of individuals. Though governments and businesses may find it easy to ignore or disregard the voices of individuals, they are often forced to respond to the concerns and complaints of groups of people working together. Trade unions, community action groups, political parties, religious institutions and campaigns are all good examples of this kind of action.

The struggle against **apartheid** in South Africa, which overthrew the apartheid **government** and replaced it with constitutional **democracy**, is a good example of what working together can achieve. For precisely this reason, the apartheid government banned political parties such as the African

National Congress, the Pan African Congress and the South African Communist Party. To try to stop effective group action, the apartheid government also passed laws making it illegal for big groups of people to meet. It even "banned" individual people from travelling, attending any meetings or leaving their houses.

Today, nonviolent, unarmed, collective forms of public expression of dissatisfaction or disagreement are protected by the **Constitution**. Organisations and groups of people are free to meet, demonstrate, picket or strike provided that they do so peacefully and in line with relevant laws. For example, if workers want to strike, the Labour Relations Act requires notice to be given to their employer within 48 hours of the strike.

If you plan a protest or demonstration or other public meeting which 16 or more people will attend, the Regulation of Gatherings Act requires the police to be notified within 7 days of the event where possible. If it is not possible to do so within 7 days of the protest, then an attempt must be made to notify authorities within 48 hours of the protest.

It is important to understand that because there is a constitutional right to protest, the notification given to authorities is not an application or a request for permission to protest – you do not generally need permission to protest. There are very limited instances in which a protest can be prohibited completely. Usually, the influence of the police on a protest is restricted to protecting protesters and the broader public and ensuring that the protest takes place in a safe place where it does not disrupt traffic or other people's activities more than is necessary. This is the major reason for the requirement of notification. For more information, you can look at this activists' guide to Protesting Your Rights, prepared by the Right2Know: http://www.r2k.org.za/wp-content/uploads/gatheringsGuide_WEB.pdf

CULTURE, RELIGION AND LANGUAGE

Section 15.

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Section 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31.

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

> ***(a) to enjoy their culture, practice their religion and use their language; and***
>
> ***(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.***

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Cultures, ideas and beliefs are important. They help shape our identities and the way that we interact with the world. The **Constitution** protects your right to have ideas and beliefs and act them out so long as you do not harm the rights of others when doing so. The Constitution also protects your right to culture and recognises that for many people their cultural identity is a crucially important part of who they are.

Freedom of Religion, Belief and Opinion

The Right to Believe and Practice Religion

South Africa has a number of diverse religions and is home to many of the world's major religions, such as Christianity, Islam, Judaism and Hinduism. The Constitution protects rights to religious belief and the rights of those who wish to practice their belief – whether that is through institutions such as marriage or through dress. At the same time, it protects the rights of people who are not religious at all.

Although there are many religions in our country, South Africa is a **secular state** in which constitutional principles and rights, rather than any system of religion, is supreme. This means that there is no single religion that is supported by the state alone, and the state will not take sides on religious questions. It also means that no one – no family member, friend or **government institution** – can force you to participate in any religious activity. The **Constitution** says that your participation at any religious ceremony, observance or event must be "free and voluntary", particularly if it is at a state-run institution like a school.

CASE STUDY: THE PILLAY CASE

Over a school holiday Ms Pillay, a high school learner, got a nose piercing. This nose stud expressed her Hindu faith. But her school prohibited her from wearing it as it went against the school's rules on school uniforms. Ms Pillay's mother took the school to court. She argued that her daughter was being discriminated against, and that her religious and cultural rights were being infringed upon.

The Constitutional Court found that the refusal of the school to allow her to wear the nose stud was unfair discrimination. Her religious and cultural beliefs needed to be tolerated by the school, and it had to make an exception for her from the general rules relating to uniforms. This case is a good example of the way in which the Constitution looks after people's right to express their religion as long as it does not unduly infringe upon anyone else's rights.

The judgment: *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21

CASE STUDY: MUSLIM MARRIAGES

While different religions have different traditions around marriage, the state has not recognised all marriages equally. This can lead to inequity and has generally disadvantaged women, particularly those in Muslim marriages.

The recognition of Muslim Personal Law in South Africa has been subject of debate since 1996. There were two Bills that were introduced for comments – one in 2000 and another in 2011. Both these Bills were met with resistance from the Muslim community and government decided not to persist with the Parliamentary processes.

In the interim, the Courts recognised Muslim marriages on an ad hoc basis.

- Muslim wives now have a right to claim money from the Road Accident Fund as a result of the law recognising a Muslim marriage in terms of the Multilateral Motor Vehicles Act.
- Courts have adjudicated matters involving disputes relating to the interpretation of the Intestate Succession Act to allow for women to claim for maintenance against their late husband's estate, and for women in polygamous marriages to claim an inheritance from their late husband's estate – whether their husbands died with or without a will.

- In *Arendse v Arendse* 2013 (3) SA 347 (WCC), the court grappled with the eviction of a Muslim women from her marital home. The court, using the Prevention of Illegal Eviction From and Unlawful Occupation Act of 1998 (PIE), found that the eviction was unlawful because it was not just and equitable to evict Ms Arendse without alternative accommodation, particularly as she lived with a disability and was the head of a household.
- In 2018, the Constitutional Court also rendered section 2C(1) of the Wills Act unconstitutional as it failed to recognise Muslim marriages. A spouse in a polygamous marriage was not entitled to inherit if the beneficiaries renounced their benefit. The Court held that the Wills Act was unconstitutional for its failure to recognise monogamous and polygamous Muslim marriages.
- The Courts have also assisted women to claim interim maintenance in terms of rule 43 of the Uniform Rules of Court.

In these court cases, the Courts have referenced the protection of the right to religion, dignity and equality.

In late 2014, the Women's Legal Centre instituted strategic litigation consolidating two other matters, which sought:

- A declaratory order to render the States' failure to legislate for the recognition of Muslim marriages as an infringement of its constitutional obligations.
- An order to render the Marriages Act, Divorce Act and Recognition of Customary Marriages Act unconstitutional for failing to provide for and consider Muslim marriages.
- An order that pending amendment of the legislation, all Muslim marriages be regulated in terms of the Recognition of Customary Marriages Act.

Following litigation in both the High Court and the Supreme Court of Appeal, the Constitutional Court unanimously held that the Marriages Act and the Divorces Act are unconstitutional for failing to recognise Muslim marriages. The Court further held that the non-recognition was an infringement of the right to equality.

The judgment: *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2023 (1) BCLR 80 (CC).

Currently, we are awaiting amendments to the Marriages and Divorces Act, and the possible promulgation of new legislation. This could be in the form of the Single Marriages Bill that was circulated for comment and/or the Department of Home Affairs Green Paper on marriages in South Africa. Parliament had until June 2024 to enact legislation.

The Right to Not Believe and Not Practice Any Religion

An atheist – a person who does not believe in any god or higher power – has her right not to believe protected by the same section of the Constitution that protects the right to believe. The Constitution also protects the right to have values, morals and opinions which are not related to religion at all. These could, for example, include political opinions or views on what is morally right and wrong.

As well as religion or beliefs, you have a right to choose your language and culture, and to do this as part of a community. You can also start a group or an association based around the practice of your religion, language and culture.

The Right to Language and Culture and Linguistic and Cultural Communities

All people and communities in South Africa have a right to practice their culture and use their language, as long it does not violate any other right in the **Bill of Rights**.

Language and Linguistic Community

There are many different languages and cultures, which the Constitution explicitly acknowledges. We have 12 national languages. The Constitution recognises the fact that the nine indigenous African languages spoken throughout South Africa were negatively affected by the apartheid government's attempts to lower their status and decrease their use. During apartheid there was an attempt to force children to learn at schools in Afrikaans and English.

The Constitution therefore requires the government to take proactive steps to improve the importance and use of languages such as isiZulu, Sesotho and Tshivenda. The Constitution also requires that the law promote, respect and encourage the use of languages commonly used in religious contexts such as Arabic and Hebrew, and languages spoken in South Africa's diverse cultural communities including Hindi, German, Greek and Gujarati.

One of the most important places for supporting the use of all South African languages is school. Both in Apartheid and in democratic South Africa, the language of instruction in schools has been used to exclude or disadvantage some (mostly black) learners. The Constitutional Court has held that the provincial department of education can intervene if a school's language policy limits access to education (for example if a school teaches in one language in an area where most learners speak a different language).

The Basic Education Laws Amendment Act has incorporated these Constitutional Court judgments into legislation by providing that public schools can be told to adopt an extra language of learning and teaching when, for example, the languages that are being spoken by the surrounding community change. If a school is teaching only in Afrikaans, but most children in the area speak isiZulu, and those children do not have access to other schools, the school can be asked to teach in both Afrikaans and isiZulu. Before making a decision on language, the government must consult with the school community. If the school is unhappy with the government's decision, they can challenge the decision at a higher level of government. If a school is asked to teach in an extra language, the government must make sure they give the school extra teachers, textbooks, and classrooms if necessary.

Culture, Cultural Practices and Cultural Community

In South Africa, many cultures have strong cultural practices and traditions. Although the Constitution respects these cultural practices and traditions, it requires these practices to conform with the rights in the Bill of Rights. For example, the Constitution prohibits discrimination against people on the basis of their sex, gender and sexual orientation, and allows all people the freedom to make their own life decisions. If a cultural or religious practice discriminates against women or gay or lesbian people, then it conflicts with the Constitution and will be prohibited.

CASE STUDY: CUSTOMARY MARRIAGES

Customary Marriages in South Africa

Customary marriages in South Africa are recognised by law through the **Recognition of Customary Marriages Act 120 of 1998**, which came into effect on 15 November 2000.

A **customary marriage** is a marriage that follows the customs and traditions of indigenous African communities in South Africa.

Requirements for a Valid Customary Marriage

According to the Act, a customary marriage is legally valid if these conditions are met:

1. Both people getting married must be 18 years or older.
2. Both must consent (agree) to marry under customary law. If one of them is under 18, their parents or legal guardian must also agree.
3. The marriage must be negotiated and celebrated in line with customary law.

The law doesn't specifically say that lobolo (bride price) is required. Still, in practice, it is an important part of customary marriage in many African communities, and the Courts recognise its role.

Couples can register their customary marriage at the Department of Home Affairs within three months, but registration is not the deciding factor in whether the marriage is valid.

How Customary Marriages are Negotiated and Celebrated

The part that often causes the most debate in court is whether the marriage was properly "negotiated and celebrated" according to custom. This process usually happens in three stages, although details vary across communities:

1. **Negotiations and agreement between families** – meetings, introductions, and discussions that lead to both families consenting to the marriage.
2. **Agreement on lobolo** – the families discuss and decide on lobolo.
3. **The bride joining her husband's family** – often marked by rituals or ceremonies, showing she has been accepted into the new family.

In **Tsambo v Sengadi (2020)**, the Supreme Court of Appeal said that the ritual of formally handing over the bride is important, but not the only factor. Customs are not fixed in time; they change as society changes.

Property and Antenuptial Contracts

If no **antenuptial contract** (a contract signed before marriage to separate property) is signed before the customary marriage, the marriage is automatically considered in **community of property**. This means all assets and debts are shared equally.

If the couple wants to be married **out of community of property** (with or without the accrual system), they must sign an antenuptial contract beforehand. If they don't, they would need to apply to the High Court later to change their marital property system.

Divorce and Ending a Customary Marriage

A valid customary marriage can only end through **divorce** granted by a court, based on the **irretrievable breakdown of the marriage**. Simply separating is not enough.

If a couple does not legally divorce, the marriage remains valid. This can cause problems if one partner tries to remarry or if one dies unexpectedly, since the existing marriage is still recognised.

The law also says that:

- Someone in a valid customary marriage **cannot marry someone else under civil law,** unless it is the same spouse they are already married to under customary law.

ACCESSING OPEN DEMOCRACY

Section 32.

(1) Everyone has the right of access to -

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The preamble of the Constitution states that one of the Constitution's purposes is to create an open society. Openness is also one of the founding values of our society. We need to change from a country where power and decisions were kept hidden from the people into one in which people are informed and decisions can be challenged. The Constitutional Court has described this as the principle of "open democracy". There are many rights in the Constitution that are attempts to make sure that this principle of open democracy is lived out in our society, many of which we have already discussed.

The Right of Access to Information

Having access to information is important for holding the government and private entities (including political parties and big private companies) accountable, as well as ensuring their transparency. If we do not have access to information about the decisions being made that impact our lives, then it is difficult for us to take action to protect our rights and hold the decision-makers responsible. The Constitution and laws passed by Parliament give us the right to access information. For example, the Promotion of Access to Information Act 2 of 2000 (PAIA) was passed by Parliament as a law to make the right of access to information real. This law explains what information we are entitled to, and the processes that we must follow to gain access to such information.

The Constitution specifically gives us the right to access "public information", i.e. any information held by the state or any state entity (for example, Eskom). PAIA, which regulates how we access this information, has been criticised for creating a complex and lengthy process for acquiring information. The difficult thing is that you have to name specific documents or pieces of information when we request information from the state. The state must provide the information to you unless it falls within certain exceptions created by law. These include situations where the release of information would result in harm to the defence or security of the country.

The right of access to information also covers information considered to be private which is held by private organisations such as businesses and even individuals. We do not, however, have an automatic right to private information and must show that we need it to protect other rights to access it. For example, you may want to request information from your medical aid about its denial of one your claims for cancer treatment because you think it will affect your right to healthcare. In this way, the right of access to information works together with other rights and can help make those rights a reality. There are also more exceptions or ways for private individuals and organisations to deny you this kind of information. For example, you are not entitled to any personal information about someone or information that could reasonably endanger someone's life.

Rights in Action: Secrecy Bill

The Protection of State Information Bill, commonly known as the 'Secrecy Bill', because it allowed the state to keep a lot of information secret, was a controversial piece of **legislation**. The Bill's purpose was to regulate how information held by the state is classified and protected. Generally, laws like this, which protect some state information, are common around the world. The problem with the Secrecy Bill is that it included broad provisions punishing journalists and whistleblowers (someone who reports a person or organisation that is doing something unlawful) for disclosing

classified information. This created the risk of people being scared to report even information that should be published in the public interest, and information which should not be classified or protected. The Bill was met with wide public criticism, especially from community activists such as the Right2Know campaign. These organisations argued that the Secrecy Bill violated the rights of freedom of expression and access to information and did not promote the value of transparency. As a result of this pressure, several changes were made to the Secrecy Bill. Despite these changes, the Bill was still problematic for a number of reasons. The opposition to the Secrecy Bill resulted in a mass march to Parliament and led to a number of changes to the Secrecy Bill. Despite this, Parliament passed the Bill, but it ultimately failed as President Zuma refused to sign the Bill on the basis that it was unconstitutional. Instead, he sent the Bill back to Parliament to be reconsidered. Parliament addressed President Zuma's concerns and referred the Bill to President Cyril Ramaphosa for signature. However, the Bill sat on President Cyril Ramaphosa's desk for a while, and he then also refused to sign it and sent it back to Parliament, also citing concerns that it was not in line with the Constitution. As of now, the Bill's progress seems to have stalled, and its future remains uncertain.

THE RIGHT TO JUST ADMINISTRATIVE ACTION

Section 33.

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

> ***(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;***
>
> ***(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and***
>
> ***(c) promote an efficient administration.***

The Constitution recognises the right to just administrative action. Administrative law regulates the decisions and actions of people and bodies that exercise public power or perform public functions. It is a powerful tool for regulating the relationship that the state has with everyone. The day-to-day decisions of members of the **executive** are referred to as "administrative action".

Examples of administrative action range from a decision of a Home Affairs official about whether to grant a foreign national refugee status or issue a passport; deciding whether a tender for building a particular road should be awarded to one company or another; a provincial head of department deciding whether a learner should be admitted to a school.

The Constitution says we have a right to just administrative action, and this right helps build an open democracy. If you think that a decision violates your right to just administrative action, you can approach a court to determine whether the decision is lawful, reasonable and procedurally fair. Administrative law is governed by a law passed by **Parliament**, the Promotion of Administrative Justice Act, or PAJA, and decisions made by our Courts. These make it clear that all administrative action must be:

> **Lawful:** Any administrative decision must be authorised by the law, and must be in line with the Constitution and all relevant laws and rules.

Reasonable: Any administrative decision must be reasonable, which means it must have a good basis and must be supported by the evidence and information before the decision maker.

Procedurally fair: An administrative decision that affects your rights must be taken in a way that is procedurally fair. This means that you should be given the chance to present your reasons and arguments, and that the decision-maker must not be biased in any way.

You also have a right to be given reasons for why a certain administrative decision was taken. This is so that you can understand the administrator's decision processes and decide if you think that it was based on incorrect facts or law that you can challenge. PAJA regulates the process for requesting reasons, which should be given to you in writing, within 90 days of your request.

THE RIGHT OF ACCESS TO COURTS

Section 34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The **Bill of Rights** contains some specific rights that guarantee that we must be treated fairly by the state, that **government** records must be available to the public, and that we have a right to have **disputes** resolved by independent bodies. This last one – the right of access to Courts – also reinforces the idea that the government is not above the law.

Courts and other independent bodies are very important protectors of our rights. When there is an infringement of rights or a dispute about rights, Courts provide an unbiased body to hear disputes.

One of the advantages of Courts, therefore, is that any person can go to a court and be treated equally to the other party, whereas outside the Courts the other party might be stronger than them. In practice, accessing justice is one of the biggest challenges to South Africa's legal system. Lawyers can be very expensive, and legal processes are often delayed, difficult to understand and drawn out.

Another reason for having Courts is that we have a rule against people 'taking the law into their own hands'. If we are left to resolve disputes by whatever means possible, sometimes people will use violence against each other when they disagree. Having an independent judge is important because that person does not have a personal investment in who wins a fight. Judges will make sure that it

is proved that someone has done something illegal, and will not just rely on what other people say about them.

FLASHBACK: NECKLACING AND MOB JUSTICE

During the 1980s when the armed struggle was at its height, the majority of people did not feel that they could achieve justice through the court system. This resulted in some people creating 'people's Courts' that would impose violent sentences on suspected informers or allies of the government. Often, it was enough just for someone to be accused of being an informer to be found guilty. The punishment was usually a violent attack. One particularly terrible punishment was death by necklacing. This involved putting a burning tyre around someone's neck and setting them alight. It is a very traumatic and painful way to die. The practice of necklacing illustrates why the right to have access to an impartial court (as well as freedom from torture) is important.

There are many kinds of Courts in our country, which you can read more about in the "How Government Works" section of this book. For some Courts it is advisable to have a legal representative – an attorney or advocate – to argue your case for you.

SOCIO-ECONOMIC RIGHTS

03

SOCIO-ECONOMIC RIGHTS

> "All human beings are born equal. Perhaps the worst violation of both dignity and rights is extreme poverty"
>
> **Mary Robinson,** UN High Commission for Human Rights

The Constitution provides for both civil and political rights and socio-economic rights. In the chapters above we've looked at the society that the **Constitution** envisages for South Africa: one in which people living here contribute towards political decisions and participate in **democracy**.

Socio-economic rights go hand in hand with civil and political rights. These rights relate to access to housing, food, water, social welfare, and education. Socio-economic rights were debated during the drafting process of the Constitution. The Constitutional Court in the *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26 held that socio-economic rights are justiciable. This meant that socio-economic rights would result in equality and freedom, and a society in which people's human **dignity** is fulfilled. At the same time, inequality prevents people from being able to enjoy freedoms and contribute towards open democracy. For human beings to live with dignity, to enjoy equality and experience freedom that allows them to achieve their full potential, we must be able to live safe and healthy lives. This is what **social justice** requires.

Socio-economic rights are incorporated in international covenants - the Universal Declaration of Human Rights of 1948 (UDHR) and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). These international treaties acknowledge that one has rights to resources, to the material things, which are essential for living a dignified life. The South African Constitution addresses the injustices of the past by incorporating socio-economic rights. The Constitution incorporates socio-economic rights to achieve a society based on equality, dignity, and freedom.

Application of Socio-economic rights

Many **socio-economic rights** require the **government** to take "reasonable measures" to "achieve the **progressive realisation**" of this right. What this means is that it must do everything that it can, within its resources, to make sure that everyone has access to these rights. Since it requires many resources to protect the right, however, the right cannot usually be achieved immediately, but will be worked towards over time. Government must take into account its obligations to achieve the realisation of these rights, when it prepares its budgets and makes its policies and plans. The Constitution does not require the impossible. But it does require the government to make determined efforts to make basic services available. Over time, it requires the government to be making constant and continuous progress by making these basic services available to a larger number and wider range of people over time, particularly, to those who are most vulnerable.

Although most socio-economic rights are subject to progressive realisation, there are some socio-economic rights that have to be realised now (although even these might be limited, as we explain on p. 26). One important example is the right to basic education, which the **Constitutional Court** has indicated is "immediately **realisable**". This is understandable because without proper education it is difficult for young South Africans from poor families to ensure that they can improve their families' position in life and stop living in poverty. Unlike the right to housing, for example, the government must not only take reasonable steps to make education available to more and a wider range of people over time: it must do everything, within in its power, to make sure that everyone has access to quality schooling as quickly as possible.

HOUSING

Section 26.

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Having a home is a basic human right and the government has a duty to protect that right. A home is a place to shelter you from heat, cold and rain, is a place where you can have privacy, where you can welcome your friends and family and where you can be safe and nurtured.

READ:

> Pheliswa and her family rent in a dilapidated building in gangster-ridden, inner city Joburg - but still, its home. Now the landlord wants them out, gangsters are threatening to hijack the building and Pheliswa is terrified they will be on the streets, homeless. How is she going to keep a roof over their heads?'

To read this story, *Living on the Edge*, by Louise McCann, also available in Sesotho as *Ho Phela Tlokotsing*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/living-on-the-edge/

History of the Right to Housing

During apartheid, housing was racially segregated by law. Non-white South Africans were forced into townships or rural homelands (Bantustans), while white people occupied developed urban areas. These forced removals were part of a broader system of spatial segregation, aimed at keeping black South Africans away from economic centres and restricting their movement. Many were relocated to areas far from employment opportunities, with poor infrastructure and minimal access to essential services such as healthcare, education, and transport.

The government provided little housing for black South Africans, and what existed was poor quality, overcrowded, and lacked basic services. Homes were often small, with inadequate plumbing and electricity, leaving many families in unsafe and unhealthy living conditions. This system of discrimination created deep economic and social inequalities that continue to impact South Africa today. The backlog in providing adequate housing is a direct result of apartheid-era policies that deliberately marginalised millions of people, making housing one of the country's most urgent social justice issues.

After apartheid, the government recognised the need to address housing shortages. Under section 26 of the Constitution, the government has a duty to take reasonable steps, within its available resources, to provide access to housing for those in need. This means that while housing is a fundamental right, it is not an automatic entitlement to a free home for everyone, but rather a commitment to progressively realizing housing access based on financial and infrastructural capacity. Over 3.5

million free homes (RDP houses) have been built for low-income families. This has housed around a quarter of the population.

Access to Housing

"The Day They Came For Our House" – Don Materra

'Armed with bulldozers
they came
to do a job
nothing more
just hired killers.

We gave way
there was nothing we could do
although the bitterness stung in us
and in the earth around us.

Section 26 of the Constitution provides for the right to access to adequate housing. It is important to think about the difference between a right to housing and a right to have access to housing. Behind this right is the idea that one day everyone in South Africa will have a house. If people do not have anywhere to live, then access means that government must create places for them to live. This does not mean that the government has to give everyone a house at no cost, but it means that it must have plans in place to support people who are buying or building their own houses, and it should plan to build houses for people who cannot afford their own house. So, to have access to housing means that government must create an environment that enables everyone to access this service – the government must remove barriers that stand in the way of people gaining access to these rights. It also means that special measures to help those who are vulnerable or disadvantaged to access the right. Paying for services should not be an obstacle preventing poor people from accessing their rights.

The **Constitutional Court** has recognised that this right does not just mean a right to a piece of land

3.3 million housing units were built by 2019, verified by AfricaCheck.org

Housing is a guarenteed right in the Constitution.

~ Section 26 of the Constitution

with a structure on it. It is more important than that. The right to access housing includes land and basic services (like waste removal and sanitation), as well as the house itself. It is also about having a home – a place of safety, privacy and dignity, in which you can be comfortable and shielded from the busyness, dangers and problems in the outside world. Having such a safe and private place is also fundamental to your right to **dignity**. The **government** must also protect your right to housing if someone else is trying to **violate** it by taking it away from you, or evicting you from your home.

"A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality." Yacoob J, Grootboom

CASE STUDY: MS GROOTBOOM AND THE CONSTITUTIONAL COURT

The case of Ms Grootboom and others was the first **Constitutional Court** hearing about the right to housing. She was part of a community of 800 people who had no place to live. The township that they had been living in was overcrowded, there was no sewerage system and recent rains had left peoples' shacks flooded. In the words of Justice Yacoob, the conditions were 'intolerable'. Nearby was a piece of private-owned land that was going to have low-income housing built on it, but was standing empty at the time. The community moved onto this land and set up informal shelters there. The owners of the land went to the Magistrate's Court to get an eviction order against the community.

The community did not have anywhere else to go – the sites in the area had been taken over when they moved out – so they did not obey the order, and the **government** brought the police to move them. During the eviction the police were violent and destroyed the community's property (their shelters were even bulldozed like under **apartheid**). When the case came to the **Constitutional Court**, the court looked at whether the housing policy in the Western Cape met the standards set by the **Constitution**.

The Court said that a policy that is reasonable must make provisions for emergency housing, especially for those people who are most vulnerable – including women-headed households, children, old people and the poorest members of society. This means that when people are going to be evicted and they have nowhere else to go, the government must make sure that there is temporary housing available for them so that they are not made homeless. Part of the right in section 26 is the right not to have your home taken away from you.

The judgment: *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19

CASE STUDY: ABAHLALI BASEMJONDOLO

In KwaZulu-Natal, thousands of people lived in informal settlements, building homes where they could. But a new law, the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act, threatened their security. Section 16 of the Act allowed government officials to order evictions, making it easier to remove people from informal settlements without proper engagement.

The Abahlali baseMjondolo Movement, a grassroots organisation representing shack dwellers fought for the rights of informal settlement residents, advocating for secure housing and fair treatment. Seeing the threat posed by section 16, the movement brought the case to the Constitutional Court, arguing that it violated section 26 of the Constitution, which protects the right to housing. They claimed that the provision would lead to mass evictions without meaningful engagement or consideration of alternatives like upgrading settlements.

The Constitutional Court ruled in their favour, declaring the law unconstitutional. The judges found that the law undermined national housing protections and failed to ensure meaningful engagement with communities before eviction. The decision reinforced that eviction should be a last resort, and governments must explore upgrading settlements rather than simply removing people.

This case was a major victory for informal settlement residents across South Africa. It reaffirmed that housing policies must be reasonable and inclusive, ensuring that communities are involved in decisions that affect their homes and livelihoods.

The judgment: *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* (2009) ZACC 31

CASE STUDY: THE BLUE MOONLIGHT CASE

In Johannesburg, 86 individuals found refuge in an abandoned industrial building. When the new owner, Blue Moonlight, decided to develop the property, they faced eviction—forcing them into homelessness. The occupiers fought back, arguing that the city had a duty to provide them with alternative housing before eviction, as protected under South African law.

Blue Moonlight sued for eviction. Lower Courts decided that while eviction was allowed, the city had to house the occupiers. The case reached the Constitutional Court, which ruled that evictions must be **just and equitable**. Since Blue Moonlight would not be left homeless but the occupiers would, the Court ruled eviction could not proceed until the city provided housing.

The Blue Moonlight case was a landmark victory for housing rights, establishing that private property rights can be limited when eviction would cause homelessness. It reinforced the government's responsibility to protect vulnerable people.

The judgment: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (2011) ZACC 33

Activating Your Rights

Since it is expensive to build a home, the government has a housing subsidy scheme for building materials and services if you cannot afford those. To check to see if you qualify, and to apply, contact your local municipality or the Department of Human Settlements.

Call Centre: 0800 1 (HOUSE) 46873

Fraud & Corruption: 0800 701 701

Eviction and Demolition

As with many of the rights we've looked at already, we need to remember that the purpose of the **Constitution** is to fix the damage done to our country during **apartheid** and to make sure that the law operates to protect people instead of harming them.

During apartheid the government created laws that restricted where people could live based on their race. If people were already living in an area where the government said they were not allowed, they would be forcibly removed from their homes. Our housing rights make sure that the state does not have the power to evict you or demolish your house anymore without a court order. Section 26(3) of the Constitution states that no one can be evicted without a court order. **Parliament** has passed a law giving effect to this right – the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act). The only way that you can be lawfully evicted now, is if the owner of the property goes to court to get an eviction order. Before a court decides on whether you can be evicted, the court must take into account the personal circumstances of your household, and whether there are women, children, elderly and persons with disabilities. Furthermore, the length of time that a person was residing on the property and whether the eviction will result in homelessness must be taken into account.

This law applies to you even if you do not own the land you are living on and regardless of whether you had a legal right to be there in the first place. In addition, the **government** and the owner of the property must engage with you and your community in a discussion and treat you with respect, care and concern throughout the process of eviction to make sure that your circumstances are understood and taken into account. If an eviction will render you homeless, there is an obligation on the Municipality to provide you with suitable temporary alternative accommodation. The aim of this is to prevent people who have homes, albeit imperfect, from becoming homeless through evictions. The state is under an obligation to proactively plan and make alternative accommodation available to those who would be rendered homeless by an eviction.

The Municipality's provisioning of temporary emergency accommodation must ensure that one's right to equality, dignity and privacy is protected.

Activating Your Rights

The PIE Act sets out the rules that must be followed before you can be evicted from your home. It applies to your situation if you are living on a property unlawfully (you do not pay rent or you do not have the owner's permission to live there). In order to evict you, the landlord must give you notice that she is going to evict you, and she must then apply to court for an eviction order. The court must consider whether the eviction would result in rendering a person homeless. A further notice must be served on a person 14 days before the hearing.

Evictions Toll Free Number: 0800 007095

You can also contact the many organisations listed in the Activating Your Rights section at the end of the handbook.

Although section 26 of the Constitution requires that the state must take reasonable measures to provide adequate housing, there are different obligations on private parties like landlords. However, if you're a **tenant facing unfair treatment**, such as unlawful eviction, excessive rent increases, unacceptable living conditions, or discrimination, you can file a **free** complaint with the **Rental Housing Tribunal** to resolve disputes without needing a lawyer.

The Rental Housing Tribunal is a group established under the Rental Housing Act that ensures fairness and equity in rental housing. If you are a tenant facing unfair treatment, you can lodge a written complaint with the Rental Housing Tribunal in your province.

Find your Tribunal via your local municipality or Department of Human Settlements. When submitting your complaint, include: your details, landlord's details, issue summary, and evidence. You may submit your complaint in person, via email, or online.

After submitting your complaint, the Tribunal will **investigate** whether the complaint qualifies as an unfair practice and **attempt mediation** to resolve the dispute. If mediation fails, the Tribunal will hold a **hearing** where both you and your landlord present your cases.

If the Tribunal rules in your favour, the ruling may order your landlord to stop the unfair practices. These rulings are legally binding. If instead the Tribunal rules in favour of your landlord, you may still request a judicial review in the High Court.

More information on the Rental Housing Tribunal can be accessed at https://www.dhs.gov.za/sites/default/files/publications/RENTAL%20HOUSING%20TRIBUNAL2.pdf

CASE STUDY: JOHANNESBURG TENANTS USE RENTAL HOUSING TRIBUNAL

The case of the Johannesburg Tenants confirmed that Rental Housing Tribunals have the power to resolve disputes between landlords and tenants. A group of tenants in Johannesburg were told by their landlord to either sign new leases with significantly higher rent or vacate their apartments. Some rents were set to more than double. The tenants refused and sought help from the Rental Housing Tribunal, arguing that the landlord's actions were unfair.

The Tribunal ordered the landlord to pause evictions while it investigated. However, instead of waiting for a ruling, the landlord took the tenants to court to force them out. The tenants argued that since their case was still under review by the Tribunal, the landlord should not be able to evict them.

The Supreme Court of Appeal ruled in favour of the landlord, stating that the Tribunal could not prevent lease terminations. The tenants then appealed to the Constitutional Court.

The Constitutional Court ruled that landlords must follow proper procedures before attempting to remove tenants. It confirmed that tenants have the right to challenge unfair rental practices under the Rental Housing Act and that the Tribunal should have been allowed to investigate fully. The Court also stated that landlords cannot raise rents in a way that effectively forces tenants out without considering fairness.

This case is crucial for tenant rights, as it reinforces that landlords cannot use rent increases as a loophole to evict people. The Rental Housing Tribunal plays an essential role in protecting tenants from unfair treatment, and tenants should use it to challenge exploitative practices. This ruling ensures that rental disputes are handled fairly and that landlords must operate within the law.

The judgment: *Maphango and Others v Aengus Lifestyle Properties* [2012] ZACC 2

HEALTHCARE SERVICES, FOOD, WATER AND SOCIAL SECURITY

Section 27.

(1) Everyone has the right to have access to

> ***(a) healthcare services, including reproductive healthcare;***
>
> ***(b) sufficient food and water; and***
>
> ***(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.***

(2) The state must take reasonable legislative and other measures, within its available resources,

to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Right to Healthcare Services

Section 27 of the **Constitution** gives us all the right to have access to healthcare services. Although the state cannot guarantee the health of its citizens, as one of the **socio-economic rights** in the Constitution, the **government** is required by the Constitution to act reasonably by making policies, plans and laws aimed at ensuring that everyone in South Africa can enjoy their right to healthcare services. Importantly, these constitutional protections extend to **everyone** living in South Africa, and no one should be excluded from this right.

Though the Constitution sets out these rights, it does not explain exactly what having a right entitles us to. The Constitution does not say anything, for example, about clinics, nurses or medications, which are important to our health, and therefore also part of our right to healthcare services. The government has spelled out these rights in policies and laws – these explain in more detail what it is that our right to health includes and what we can expect when we enter a healthcare facility.

In order to deepen our understanding of the right to healthcare services, we can look at how the government has entrenched it through policies and laws. It is important to remember, though, that the Constitution leaves these discussions open and it is up to us, as users of the healthcare system and activists, to help explain our demands in terms of our right to health. If we do not tell the government what we think our rights mean we may end up living with laws, policies and ultimately treatment in healthcare facilities that do not match our needs and expectations of the right to health.

READ:

> 'Nzwaki's loving husband has changed. He's become rude, drunken and is never home – and he is flush with money. Her friend Nora disappears for a few days but returns to confront an upsetting situation. How are these things linked? Nzwaki soon finds out. Is she brave enough to do the right thing?'

To read this story *Playing with Lives*, by Vixene Jones, about Nzwaki's battle to access anti-retroviral drugs, also available in isiXhosa as *Ukudlala ngoBomi Babantu*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/playing-with-lives/

Example: The right to health has implications beyond just our physiological well-being. It has far-reaching implications for the way we see ourselves and others. It can empower and dignify.

To read another power story about the importance of a mother's access to anti-retroviral drugs, visit https://www.theglobalfund.org/en/stories/2019/2019-06-03-conquering-hiv-again/

In the past contracting HIV felt like a death sentence. The government did not recognise it as an entitlement under section 27. However, through advocacy efforts, HIV treatment became a right and as a result lives were changed.

The **Constitution** emphasises the importance of the right to health by mentioning it repeatedly in several places. It stresses the importance of children's rights to basic healthcare services (section 28) and prisoners' rights to medical treatment (section 35). It also entrenches a right to bodily and psychological integrity (section 12) and a right to an environment not harmful to your health (section 24). Physical, as well as mental health, is a priority in the right to health. It also specifies that this right must include reproductive healthcare services, which includes access to preventative services for HIV and STI and medicines and services for their treatment, and access to contraception and abortion. Additionally, it asserts that no one may be denied emergency medical treatment.

The majority of South Africans, around 84% according to the President in 2024, use public health facilities, while 16% utilise private healthcare facilities. These people choose to pay for healthcare services, either "out of pocket" or by buying health insurance through medical aid schemes. The Constitution protects the rights of everyone to have access to healthcare services – regardless of whether they use state or private healthcare facilities. Parliament has passed a law detailing nearly 300 conditions for which medical aids must "pay in full". These include some cancers, a wide range of bone breaks, TB, HIV and ZS chronic conditions including diabetes and hypertension.

Thinking about our rights: *Busi has breast cancer, one of these conditions listed by Parliament. Her medical aid will not pay for her full treatment. Is this a violation of her right to life? What about her right to health? What can she do about it?*

The South African Constitution places **obligations** to respect constitutional rights on not only the government but also private parties, such as doctors, hospitals and medical aid schemes. Both users of the public and private healthcare systems enjoy the right of access to healthcare services. The constitutional right to health not only places the obligation on the state to provide healthcare services – which it does through the public health sector – but also to regulate hospitals and companies within the private healthcare sector to ensure access to affordable, efficient and quality healthcare services.

Rights in Action: The Treatment Action Campaign

The Treatment Action Campaign (TAC), a country-wide organisation mostly made up of people living with HIV, took the Department of Health to court. The TAC argued that pregnant women had a right to an anti-retroviral drug called "Nevirapine". One Nevirapine pill taken by a pregnant mother prevents her from passing HIV on to her child during childbirth.

PATIENTS' RIGHTS CHARTER
EVERY PATIENT HAS A RIGHT TO:
Healthy and safe environment,
Participation in decision-making,
Access to health care,
Knowledge of one's health,
Insurance/medical aid scheme,
Choice of health services,
Treatment by a named health care provider,
Confidentiality and privacy,
Informed consent,
Refusal of treatment,
A second opinion,
Continuity of care,
Complaints about health services
All included in the Constitution
~ Sections 35, 28, 24, and 12 of the Constitution

The government had refused to provide Nevirapine to pregnant mothers in all hospitals throughout the country. The high cost and lack of access to this life-saving drug left many pregnant mothers unable to treat their condition without governmental support. The Constitutional Court decided that the government was obliged to provide the medicine to pregnant mothers across the country. The government was able to acquire the medicine for free, and it was safe and effective. The government also had to provide access to voluntary counselling, testing, and feeding milk where appropriate. (Before the judgment, an HIV positive pregnant mother had a 30% chance of giving birth to a baby with HIV.) Today, the government provides Nevirapine to pregnant mothers for free, as well as providing free anti-retroviral treatment to people living with HIV across the country.

The judgment: *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16

> "We are not pariahs. We have a disease, and we are entitled in terms of the Constitution to have our humanity respected and our need for medical care attended to by the state within its capacity."
>
> **Justice Johann Kriegler, 4 April 2002**

Thinking about our rights: *Do your rights to health, dignity and life mean that the government should provide any and all potentially lifesaving treatment and medication no matter the cost?*

What Does My Right to Health Mean For Me When I Enter My Clinic or Hospital?

We have a right to treatment in healthcare facilities that is non-discriminatory, humane and respectful of our personal information. Since everyone has the right to healthcare services, it is important to note that this also includes foreign nationals. Although the **government** may well have different policies for how this is to take place, it is important to note that no one can be turned away from clinics or hospitals just because they are not South African.

The **Constitution** also protects the right to receive emergency medical treatment even more strongly – no one may be refused medical treatment if they are suffering a medical emergency. The Constitution also protects a person from medical treatments, research, or sterilization without their consent. This is rooted in the Bill of Rights, which includes a right to equality, dignity, bodily integrity, freedom and security of the person, health, and not to be subjected to cruel, inhuman and degrading treatment.

In order to protect our right to health, different government departments have created policies and laws to explain what we can expect in healthcare facilities. These include the Patients' Rights Charter and the Batho Pele Principles, both of which the law requires to be stuck up on a wall in all healthcare facilities in the language spoken by the majority of people in the surrounding community. This ensures that when receiving care, patients are able to participate in decisions affecting their own health and treatment. Many of these rights have been repeated and confirmed by **Parliament** in the National Health Act. Enacted in 2003, this Act established a uniform national health system to provide equitable health services, institute oversight and regulation of these services, advance transparency, improve infrastructure, and promote cooperation between public and private health providers.

Some of the things that fall within your right to health include:

- a right to see a healthcare professional if you are sick as quickly as is possible;
- a right to be treated with **dignity**, care, concern, sensitivity and empathy by nurses, doctors and other healthcare facility staff;

- a right to a clean, safe healthcare facility;
- a right to information about your own health and to understanding and being able to choose your treatment; and
- a right to receive the medication you require for the treatment. If it is chronic medication, like HIV or TB medication, you must receive it regularly. **Stock outs** and **shortages** of medicines violate your right to health.

CASE STUDY: SECTION27 V MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH [2023] ZAGPPHC 306

In May 2022, SECTION27, together with three women and a child who were denied free healthcare services, initiated legal proceedings against the MEC for Health. The Gauteng High Court upheld the right of all pregnant and breastfeeding women, and children under the age of six to receive access to free health services at all public health establishments including hospitals. This right exists irrespective of nationality and documentation status.

In its order, the court declared that the policy that was introduced by the Gauteng Department of Health in 2020, which had the effect of denying healthcare services to pregnant and lactating women and young children who are asylum seekers, undocumented, or persons affected by statelessness, was unlawful. The Gauteng Department of Health was ordered to amend its policy by 16 October 2023.

In addition to the declaration of unlawfulness and order to change the policy, the court ordered that a circular reaffirming this right be issued to all provincial departments. The court also ordered the creation and presentation of posters and notices displaying this right in all health establishments.

This case stands as a victory for all women who are pregnant and have young children in South Africa.

In the spirit of enhancing equitable healthcare and access, the state passed the National Health Insurance Act 20 of 2023 (NHI Act). The NHI Act was debated for a long time before the President decided to sign it into law. The NHI seeks to provide universal healthcare to all. Some concerns

raised with the Act include the NHI Fund's governance, which is vulnerable to corruption and political interference, the exclusion of asylum seekers and undocumented individuals from coverage under the Act, lack of transparency in procurement processes, and the exclusion of civil society from key NHI Fund committees.

Mental Health Rights

Mental health is a fundamental part of overall well-being and is protected under the Constitution's broader right to healthcare services. While physical healthcare often receives more attention in public policy and resource allocation, mental healthcare is equally essential to ensuring a dignified life. The right to mental healthcare encompasses access to appropriate medical treatment, humane and respectful care, and protection from abuse, neglect, and discrimination.

Despite these legal protections, South Africa has faced significant challenges in providing adequate mental health services. Limited resources, stigma, and systemic failures have resulted in violations of the rights of mental healthcare users, often with devastating consequences. The *Life Esidimeni* disaster is a stark reminder of what happens when these rights are ignored. It underscores the necessity of strong legal protections and government accountability to prevent future tragedies and to ensure that mental healthcare services are delivered in a manner consistent with constitutional and human rights principles.

CASE STUDY: THE LIFE ESIDIMENI DISASTER

In October 2015, the MEC for Health in Gauteng announced that the Gauteng Department of Health had terminated its contract with Life Esidimeni, which provided long term residential mental healthcare services to almost 2000 people.

Families of mental healthcare users at Life Esidimeni facilities were concerned about where their family members would go, and approached the South African Depression and Anxiety Group and SECTION27 for assistance.

Families and their allies tried to engage with the Gauteng Department of Health, including through

meetings, protests and litigation. Despite the concerns of both families and experts within and outside of the Department, mental healthcare users were moved out of Life Esidimeni in large groups over a short period of time. Mental healthcare users were moved into facilities that were not equipped, staffed, or experienced enough to take care of them.

Very quickly, people began to suffer and to die. They died in conditions of terrible neglect, with bedsores, gangrene, and having choked on foreign items they had swallowed. At least 144 people died following their moves out of Life Esidimeni.

Just as different legal process had been adopted to try and prevent the suffering and deaths, so legal processes were used afterwards, to understand what had happened, prevent a repeat of the disaster, and secure redress and accountability.

The Health Ombud investigated and produced a report in February 2017.

The Health Ombud recommended an alternative dispute resolution process, which took place in the form of an Arbitration before former Deputy Chief Justice Dikgang Moseneke. The Arbitration Award of 2018 laid out the circumstances of the deaths and the violations of the rights to life, dignity, and access to healthcare. The Arbitrator awarded constitutional damages for these rights violations, as well as requiring apologies, the reform of the mental healthcare system, and the construction of a memorial.

In 2021, a judicial inquest was held into the deaths. The inquest lasted 143 days and resulted in a judgment that found that nine of the deaths were unnatural and were, on the face of it, caused by the conduct of the former MEC for Health and the former Director of Mental Health. The inquest judgment opened the door to criminal prosecution on charges of culpable homicide.

No prosecution has been announced.

The Health Ombud's report: https://www.sahrc.org.za/home/21/files/Esidimeni%20full%20report.pdf

The arbitration award: https://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf

The inquest judgment: *Life Esidimeni Inquest* [2024] ZAGPPHC 676

Activating Your Rights

The Department of Health has a policy that requires each and every healthcare facility to have an easy-to-use, confidential, thorough written complaints procedure. You can use this if you believe you are not receiving the service you are entitled to in terms of the right to health. You can also contact the Health Ombud. See here for how to lay a complaint: https://healthombud.org.za/

Right to Food

All people need food and water if they are to be healthy and develop physically and mentally. The Constitution recognises the right to "sufficient food and water". These rights are clearly very closely linked to the right to healthcare that we discussed above, as well as **dignity, equality** and the **right to life**. In fact, in India, where the law doesn't have a specific right to food like ours does, food is considered to be a part of the right to life.

Unlike the right to healthcare, Courts and **legislation** have not given much substance to this right. We can look at international standards about it to gain some idea of what it means, and we can also think about how the other rights in the same section of the **Constitution** have been interpreted by Courts to understand this right. There is a lot of room for people living in South Africa to make claims and give content to this right.

What Does 'Sufficient Food' Mean?

A 2024 report by the Human Sciences Research Council Global Hunger Index shows that although starvation is not common in South Africa, 8.1% of the population is undernourished, and one in four people are hungry on a regular basis, and many households struggle to afford food even when it is available. Half of people living in South Africa are often at risk of going hungry because of the circumstances in which they live. Even when people do not go to bed hungry, many people in South Africa suffer from "hidden hunger". This is a term used to describe people who, despite getting enough food not to feel hungry, do not have access to nutritious, healthy food and are therefore at risk of becoming obese or malnourished. This poses increased risks to children in South Africa. Malnutrition in early childhood leads to incomplete physical development, including mental development, which cannot be fixed later in life. In fact, the Global Hunger Index report warns us that 17.5% of children under five are developmentally stunted. A lack of adequate food therefore

contributes to inequality in our society, and directly impacts on other rights, including the right to health.

Progressive Realisation of the Right to Food

Although there is no Food Act and have not been many cases that tell us how the right to food is going to be realised, this right is affected by many bits of law. It is important to think about where our food comes from in order to understand what the right to food protects. Food is generally produced by farmers. Some people plant or farm their own food, but most people in South Africa buy some or all of their food from shops whether small local stalls or big supermarket chains. All of the parts of this chain have important implications for the right to food, and are areas that the government has to regulate as part of its **obligations** in terms of this right.

As we need food, there is an enormous private market for food. Just as with the right to health in the private sector, the government has constitutional obligations to regulate this market to make sure that we can enjoy our right to sufficient food. The food that we need to eat to live and be healthy on a daily basis should not be so expensive that it is unaffordable. The government must protect our right to food by controlling the prices of food and also ensuring that we can only be sold good quality food. This is true even if we are shopping at shops like Pick n Pay, Shoprite or a local spaza shop. Those who sell us food also have legal and constitutional obligations not to violate our rights by profiting from making basic food too expensive to afford.

The government has taken some steps towards providing food to those who cannot access it themselves. For example, over 9 million learners receive meals at school through the National School Nutrition Programme, which helps them concentrate on lessons—allowing them to enjoy their right to education—through government programmes. These programmes only address the needs of specific groups of people (for example, school learners); there is no comprehensive programme for all people who cannot afford to access food themselves. It is quite likely that the government is not yet fulfilling its duty to progressively realise the right to have access to sufficient food.

CASE STUDY: NATIONAL SCHOOL NUTRITION PROGRAMME

In March 2020, during the lockdown of the COVID-19 pandemic, the Department of Basic Education decided to suspend the rollout of the National School Nutrition Programme (NSNP), leaving millions of children without, what was for many, their only reliable meal of the day.

In the lead-up to the phased reopening of schools, the Minister of Basic Education and the Department made numerous public and written undertakings that the NSNP would be reinstated for all qualifying learners as soon as schools reopened. This included learners who were not yet scheduled to return to class physically. Schools began a phased reopening on 8 June 2020, starting with Grades 7 and 12. However, contrary to the earlier undertakings, the Minister announced that the NSNP would only be provided to learners in phases.

Equal Education, along with the School Governing Bodies of Vhulaudzi Secondary School and Mashao High School, launched an urgent application in the High Court. They argued that the government's failure to provide meals to all qualifying learners was a breach of its constitutional and statutory duties.

The High Court held that the suspension of the NSNP constituted a violation of the Department of Basic Education's duties to realise the right to basic education and the right to basic nutrition. The High Court ordered that the NSNP be rolled out with immediate effect. The Minister of Basic Education and MEC's of the provincial education departments were ordered to report to the court on its compliance with the court order.

The judgment: *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306

CASE STUDY: PRICE FIXING

Bread is an important staple food for many people living in South Africa. From about the late 1990s to 2006, the main bread manufacturers operated as a cartel. The companies agreed to increase bread prices by the same amount, simultaneously, at agreed upon times. These companies also divided markets by agreeing to supply specific areas, ensuring that each would control a certain area, which further reduced competition. The ultimate goal was to fix prices at a high level and reap higher profits as a result. The Competition Commission, a body that regulates unfair business practices investigated the companies that had participated in the cartel and imposed a substantial fine.

Any company that sells a food product, especially one that is essential for vulnerable people, is a key part of food delivery and therefore takes part in fulfilling the right to food. This case is a good example of how the pricing of products impacts this right.

Right to Water

South Africa is one of only 52 countries that guarantees access to water in its Constitution. The right to water entitles us to a vital life-giving resource: we need it in order to drink as well as to cook, wash, clean, go to the toilet and to grow our own food. Water is essential to the enjoyment of our rights to **dignity**, healthcare and life. Both a lack of water and exposure to water that is not properly clean or appropriate for drinking can result in the outbreak of serious diseases.

There is no specific amount of water to which each person or family is entitled in terms of the Constitution, because what is "sufficient" will vary from place to place. The Constitutional Court has indicated that, like other social rights in the Constitution, the state is under a constant and continuous duty to make water accessible to a wider range and larger number of people over time.

The state must make strong efforts to ensure that we can all access enough clean water to live our daily lives. This means that our water sources must be close enough to our homes to be easily accessible and must be enough, given the specific climate and circumstances in which we live. If we cannot afford to pay for water, the state must provide it to us for free. It cannot without warning simply cut off our water supply because we cannot afford to pay for it.

In South Africa, free basic municipal services are provided to poor households. Every qualifying household is entitled to 6,000 litres of free water per month. According to StatsSA, in 2025 71,8% of urban residents have access to safely managed water, but only 36,7% of rural populations do—and nearly all those relying on limited, unimproved, or even surface water live in rural areas. In contrast, access to basic water is higher in rural areas (44,2%) than in urban ones (27,5%), highlighting the uneven quality of supply." However, many households who do not qualify for the free basic municipal services are still in need and struggling to access water. In response, the government has instituted the National Water and Sanitation Master Plan with the goal of developing water resources, delivery, and access until 2030 and beyond.

CASE STUDY: ACCESS TO SUFFICIENT WATER

In *Mazibuko and Others v. City of Johannesburg and Others* (2009), the Constitutional Court addressed the constitutional right to access to sufficient water under Section 37. In this landmark case, the applicants were residents of a township in Soweto, Johannesburg. They argued that the City of Johannesburg's water policy violated their constitutional rights.

In 2004, the City of Johannesburg started Operation Gcin'amanzi to address water losses and non-payment in Soweto, relaying water pipes and installing prepaid water meters. These residents argued that the prepaid water meters were imposed without consulting the residents themselves, and resulted in automatic water cutoffs, which did not occur in wealthier areas. The residents then argued that this unequal access to water proved insufficient to meet their basic needs, and demanded an increased allocation in free water per household per month. The lower Courts ruled in favour of the residents, but the Constitutional Court disagreed, deeming the policy as reasonable and in compliance with the Constitution.

The Court ruled that determining "sufficient water" is a policy decision for the government, and Courts will not set specific quantitative standards for service delivery. Although imperfect, the policy did not deny water to the residents arbitrarily. Ultimately, the outcome of this case reinforced the principle that South Africa's government has a duty to progressively realise rights after considering the economic and financial constraints to guaranteeing this socioeconomic right.

The judgment: *Mazibuko and Others v. City of Johannesburg and Others* [2009] ZACC 28.

MAZIBUKO AND OTHERS V. CITY OF JOHANNESBURG AND OTHERS [2009]

"Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water... Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa... The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor."

— Justice Kate O'Regan

Right to access Water ~ Section 27 (1)(b) of the Constitution

> "A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational."
>
> Justice Yvonne Mokgoro in *Khosa v Minister of Social Development*

Right to Social Security

Access to many of our basic needs such as food, shelter and healthcare often requires financial resources. South

Africa has a very high rate of unemployment, meaning that many people cannot afford to pay for their basic needs. The right to social security includes social assistance, meaning financial assistance from the **government** for your basic needs.

Parliament has enacted legislation to fulfil this right, most notably the Social Assistance Act 13 of 2004. However, the mere existence of a law does not guarantee the realisation of this right, as their effective implementation depends on the executive branch. But the executive is particularly prone to corruption and inefficiency which often interferes with peoples' rights.

Applications for social grants must be processed in a reasonable amount of time. While there is no absolute rule about what time period is considered reasonable, the Court has found that a delay beyond 3 months is unreasonable. Grants may not be cancelled without notice and without good reasons.

CASE STUDY: SOCIAL SECURITY

The **Black Sash Trust v. Minister of Social Development and Others** (Freedom Under Law NPC Intervening) case, decided by the Constitutional Court in March 2017, dealt with the failure of the South African Social Security Agency (SASSA) to take over grant payments, requiring an extension of an invalidated contract under judicial supervision. The Court held that SASSA and Cash Paymaster Services (CPS) had a constitutional duty to ensure continued social grant payments beyond March 2017 and mandated continued judicial oversight due to prior failures. The ruling reinforced the judiciary's role in protecting social welfare rights and holding government officials accountable for inefficiencies and failures in executing their constitutional obligations.

The litigation related to this issue continued over several years following the 2017 decision, including the Constitutional Court extending the invalid contract with CPS to protect recipients of social grants, reinstating its supervisory role, and later holding the Minister of Social Development, Bathabile Dlamini, personally liable for her conduct (and the legal costs that resulted from this conduct).

CASE STUDY: RESTRICTING SOCIAL SECURITY ACCESS

Following the expansion of the Social Relief of Distress Grant to cater to the many people needing social assistance during and after the COVID-19 pandemic, government sought to restrict access to these grants by issuing complex regulations. In *Institute of Economic Justice and Another v*

Minister of Social Development and Others (2025), the High Court held that several regulations were unconstitutional and invalid, including the requirement for only online applications, unfair income testing, and a flawed appeals process, making access to the grant more difficult for many eligible individuals. The judgment also ordered the government to address systemic issues of non-payment and late payments.

The judgment: *Institute of Economic Justice and Another v Minister of Social Development and Others* 2025 (4) SA 249 (GP)

Activating Your Rights

Social Grants Eligibility and Requirements

If you are struggling to provide for yourself or your family, you may be eligible for a social grant from the South African Social Security Agency (SASSA). To apply, visit your nearest SASSA Service Office. If you are unsure of its location, call the toll-free number (0800 60 10 11). You will need to bring your identity document (including an ID Book or Refugee Permit). If you are married or divorced, provide your marriage certificate or divorce order.

Grant Types and Eligibility

- **Child Support Grant** – Available to a parent or caregiver who meets the income eligibility criteria. The grant is accessible nationwide through SASSA.
- **Older Person's Grant (State Pension)** – Available to individuals older than 60 who meet the income and asset threshold requirements.
- **Disability Grant** – Available to individuals aged 18 to 59 with a physical or mental disability that makes them unfit to work for longer than six months. A state-appointed doctor must conduct a medical assessment.
- **Care Dependency Grant** – Available to the parent or primary caregiver of a child with a disability. Foster parents appointed by the court may also apply without income threshold restrictions.
- **Foster Child Grant** – Available to individuals with a court order designating them as foster caregivers for a child. There is no means test for foster parents.

- **Social Relief of Distress Grant** – Temporary assistance provided in times of emergency or financial distress. Eligibility includes those waiting for child grants to be processed, individuals affected by crises (such as fire or disasters), and families who have lost their breadwinner due to death or incarceration for a short period. The grant is issued for three months but can be extended. The Social Relief of Distress Grant was significantly expanded to provide relief to people during the COVID-19 pandemic. See p. 126 for more information.
- **Grant in Aid** – Available to individuals already receiving a social grant but who require full-time care from a caregiver. Applicants must be assessed by a doctor and cannot receive this grant if they are in a state institution.
- Unemployment Grant – Available to individuals who are unemployed and do not receive any other form of social grant or UIF benefits. Applicants must meet certain income and means test requirements.

Note on Eligibility:

- Eligibility for grants – whether you can receive them or not – is determined through a **means test, assessing household income and assets**. To demonstrate financial eligibility, applicants must submit an affidavit detailing their income and assets, including those of their spouse if applicable, along with supporting documents such as bank statements or pay slips.
- For disability grant applications, a medical assessment report from a doctor confirming your condition is required. Some grants can be applied for online through the SASSA website or via WhatsApp. Ensure your contact details are updated for notifications on your application status.
- SASSA Toll free: 0800 60 10 11 or CPS 0800 60 01 60.

  Email: GrantEnquiries@sasssa.gov.za.
- Dept Social Development National Office: Private Bag X901, Pretoria, 001 or at the HSRC Building, 134 Pretorious Street, North wing, Pretoria.

  Phone number: 012 312 7727 / 012 312 7500

  For up-to-date information and to locate specific contact numbers by province, visit https://www.dsd.gov.za/index.php/19-contact-us).

  Email: customercare@dsd.gov.za

- For up-to-date information on the processes and values of social grants visit http://www.gov.za/services/services-residents/social-benefits.
- The Black Sash also has useful information. http://www.blacksash.org.za/index.php/your-rights/social-grants.

CHILDREN'S RIGHTS

Section 28.

(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic healthcare services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense,

in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

History

The lasting impact that Apartheid has left on black children makes section 28 of the Constitution especially important. During Apartheid, black children were treated the same as adults, exposing them to brutality and oppression that no child should ever have to endure. Because of this, the Constitution grants express rights and special protections to ensure that each child has a right to name and nationality, to family care or appropriate alternative care, to basic nutrition, shelter and healthcare, and to protection from ill treatment, abuse and labour exploitation.

Aside from a few rights that exclusively apply to adults, children (anyone under 18 years of age) have all the rights that adults have, in addition to safeguards in relation to the criminal justice system, and in all court cases. Ultimately, the Constitution asserts that the child's best interest are of "paramount importance," because they require special care, empathy, and attention.

What Does the Law Tell Us About the "Best Interest of a Child?"

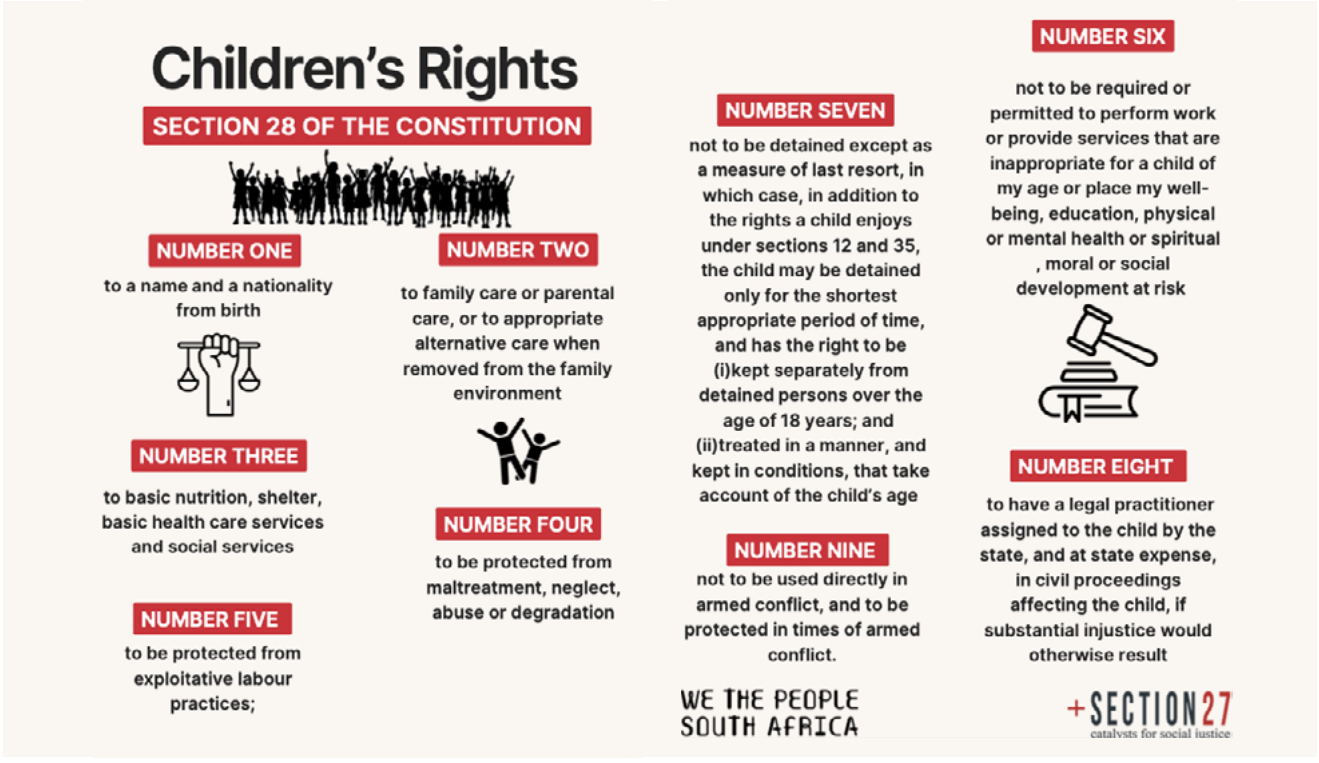
The Constitution falls in line with the solemn undertaking as a nation to create "a new and caring society" – one where children should be treated as children: "with care, compassion, empathy and understanding of their vulnerability and inherent frailties." Even when children are in conflict with the law, the Court does not "permit the hand of the law to fall hard on them like a sledgehammer. The Constitution demands that our criminal-justice system should be child-sensitive." [47] *Freedom of Religion South Africa* [2019] ZACC 34.

This is why the Constitution says that in any interaction or decision where children are

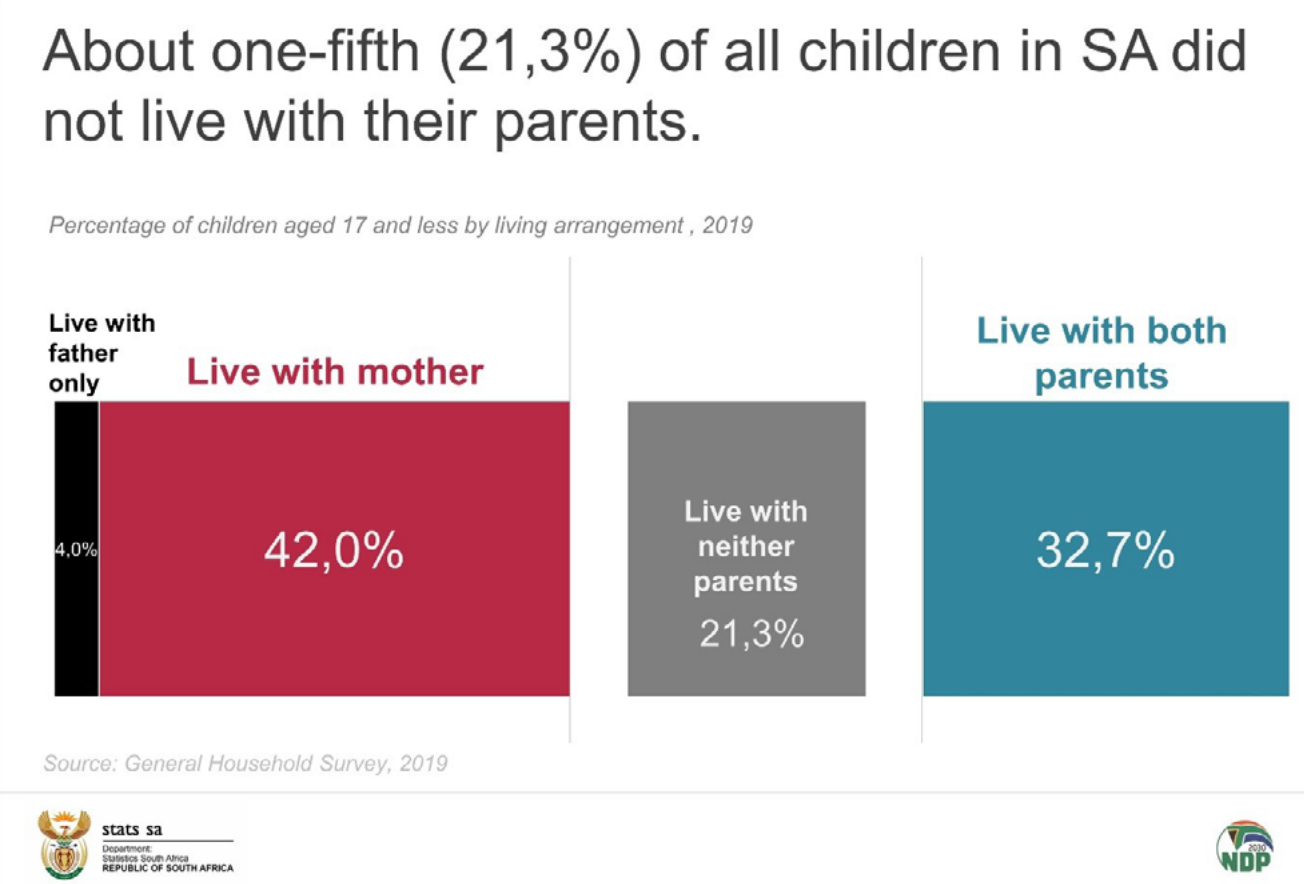
involved, the child's best interest are "of paramount" – or highest – importance. The Constitution expects us to put children's needs ahead of our own. But it does not stop there. To make sure that children's rights are protected, the **Bill of Rights** has a number of child-specific rights. **Parliament** has passed **legislation** to give more details to children's rights, and the duties of government and society towards children. It is called the Children's Act.

Thinking about our rights: *should children be able to decide which parents they want to live with in the case of a divorce?*

The Constitution makes it clear that "the best interests of the child" is paramount. Therefore, it is mandatory that due regard and due consideration be given to any views and wishes expressed by the child, especially when determining the totality of circumstances related to a divorce. In *AC v ADT JOL* 33077 (GJ) (2015), the Court held that "[i]It was in the best interests of the child to at least attempt establishing meaningful contact with the father" after hearing the child's testimony and finding that the child's mother played a significant role in instilling fear and anxiety onto the child about the identity of her father.


Children's Rights
SECTION 28 OF THE CONSTITUTION
NUMBER ONE
to a name and a nationality from birth
NUMBER TWO
to family care or parental care, or to appropriate alternative care when removed from the family environment
NUMBER THREE
to basic nutrition, shelter, basic health care services and social services
NUMBER FOUR
to be protected from maltreatment, neglect, abuse or degradation
NUMBER FIVE
to be protected from exploitative labour practices;
NUMBER SEVEN
not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i)kept separately from detained persons over the age of 18 years; and (ii)treated in a manner, and kept in conditions, that take account of the child's age
NUMBER NINE
not to be used directly in armed conflict, and to be protected in times of armed conflict.
NUMBER SIX
not to be required or permitted to perform work or provide services that are inappropriate for a child of my age or place my well-being, education, physical or mental health or spiritual , moral or social development at risk
NUMBER EIGHT
to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result
WE THE PEOPLE SOUTH AFRICA
+SECTION27
catalysts for social justice

Separately, in *CRI (born B) v MRI* JOL 29946 (ECG) (2013), the Court "had to give due consideration to the views expressed by the minor children if they were of an age, maturity, and stage of development to be able to meaningfully participate in the proceedings." After fitting the children's testimony into the totality of circumstances (children had been in the applicant's sole custody for more than two years, and that during that period they had not had any contact with their father), the Court found that "the respondent should be allowed to see his children and granted supervised contact."


About one-fifth (21,3%) of all children in SA did not live with their parents.
Percentage of children aged 17 and less by living arrangement , 2019
Live with father only
Live with mother
4,0%
42,0%
Live with neither parents
21,3%
Live with both parents
32,7%
Source: General Household Survey, 2019
stats sa
Department: Statistics South Africa
REPUBLIC OF SOUTH AFRICA
NDP

Source: Department of Statistics South Africa https://www.statssa.gov.za/?p=14388
Should you choose to create your own graph from primary data, the complete data set can be found in the file "GHS 2024 Time Series of selected variables, 2002-2024"

Children at Home

Every child has the right to be cared for by a family. Though not specifically listed in the Constitution, the Court has held that the right to **dignity** means that every person also has the right to a family life. Families come in many different shapes and sizes depending on cultural, social, and religious backgrounds. Every child has a right to a family that cares for them. This could be the child's parent(s) or guardian(s), or if this is not possible, someone else. This is why we call children 'dependents': we do not expect children to look after themselves and they depend on other people to look after them. A child's family should ensure that they have enough food and are living in a sheltered environment.

The **government** must also help families take care of children, and child social grants are available for families earning under a certain amount. This includes child support grants, care dependency grants, foster child grants, and other grants that may be available per page (See page 127 on social grants).

Children must be protected from being maltreated, neglected and abused. If a family cannot do this (or if they are the people abusing or neglecting the child), then the government must take responsibility for protecting the child. This might mean that alternative care and accommodation are found for the child. The Constitution takes abuse of children very seriously, and no one, including parents, is allowed to physically, verbally or emotionally abuse children, as this is a violation of children's rights.

Children in Society

Children may not be forced to work or to do anything that is not appropriate for their age. This includes joining the army, participating in armed conflicts or being imprisoned with adults. It is important that nothing stops a child's healthy development. Because children are dependent on others for care, they are vulnerable. No one is allowed to take advantage of this vulnerability by forcing a child to do something that is bad for their physical or mental health or spiritual, moral or social development.

Parliament has decided to give children extra protection. For instance, it is illegal to employ a child under the age of 15. (You can read more about the right to education on p. 138). Only children between the ages of 15 and 18 can therefore legally be employed (see below chart for specific regulations). Children shall also receive appropriate accommodations and also get special treatment if they are accused of committing a crime. They can only be kept in prison for the shortest amount of time possible, and they should be separated from adults in prison. Children also must be given legal assistance if they need to go to court for any reason.

Standard	Age	Meets International Standards	Legislation
Minimum Age for Work	15	✓	Article 43 of the Basic Conditions of Employment Act (BCEA)
Minimum Age for Hazardous Work	18	✓	Regulations on Hazardous Work by Children in South Africa; Articles 4-10 of the Basic Conditions of Employment Act
Identification of Hazardous Occupations or Activities Prohibited for Children		✓	Regulations on Hazardous Work by Children in South Africa; Articles 4-10 of the Basic Conditions of Employment Act
Prohibition of Slavery, Debt Bondage, and Forced Labor		✓	Article 48 of the Basic Conditions of Employment Act; Article 13 of the Constitution; Article 141 of the Children's Amendment Act; Sections 4 and 5 of the Prevention and Combating of Trafficking in Persons Act of 2013
Prohibition of Child Trafficking		✓	Article 141 of the Children's Amendment Act; Section 4 of the Prevention and Combating of Trafficking in Persons Act of 2013
Prohibition of Commercial Sexual Exploitation of Children		✓	Article 141 of the Children's Amendment Act; Chapter 3 of Criminal Law Amendment Act 32
Prohibition of Using Children in Illicit Activities		✓	Article 141 of the Children's Amendment Act
Minimum Age for Voluntary State Military Recruitment	18	✓	Article 52 of the Defense Act
Prohibition of Compulsory Recruitment of Children by (State) Military		**N/A***	Article 52 of the Defense Act
Prohibition of Military Recruitment by Non-state Armed Groups		✗	

Children's Bodies

Children have the right to protect, control, enjoy and explore their own bodies and individual identities, even if their parents disagree with their choices. Adults may not hurt or injure children as punishment. The Constitutional Court in 2019 found that corporal punishment in the home (such as hitting, slapping or spanking a child to correct behaviour), even if moderate, is unconstitutional. Other adults, including teachers, may never ever hit a child. This is true no matter how naughty the child is.

The judgment: *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34

It is very important that children are allowed to explore their own bodies and sexuality without discomforts or threats. The **Constitutional Court** has reminded us that this is a normal part of children's development. Adults, including parents and teachers, should make sure that children are comfortable to speak openly with them about sex so that they can get advice about ensuring that they can explore their sexuality in a way which is both enjoyable and safe. Someone who is an adult – over 18 years old – is never allowed to have sex with a child, even if it seems that the child agrees to do so. Any adult that engages in a sexual relationship with a child below the age of 16 will be charged with statutory rape, regardless of whether the sex is consensual or not. Moreover, exposing a child below the age of 18 to pornography, videos or pictures of nudes, or touching their private parts are very serious sexual offenses. The Constitution also prohibits children for marrying.

Sexual and reproductive health rights are among the rights embedded in section 27 of the Constitution, and they go hand in hand with children's rights to their bodies. For instance, every girl has a right to manage menstruation in a hygienic way, in privacy and with dignity, every child has a right to access medical treatment for HIV and other serious health conditions, and everyone, including children, has the right to reproductive healthcare services, including abortion services.

CASE STUDY: TEDDY BEAR CLINIC

In 2007, **Parliament** passed an amendment to the Criminal Offences Act that made it a crime for children between the ages of 12 and 16 to have sex, or to hug and kiss, even if both children had agreed to. If two children did do any of these things, then anyone who knew had to report them to the police and they could both be convicted of a crime. A group of organisations, one of which was called Teddy Bear Clinic, approached the **Constitutional Court** arguing that this law violated

children's specific rights as children must have their best interests considered as well as their rights to **dignity**, privacy and bodily integrity.

Taking into account evidence presented by experts on child development, the Constitutional Court decided that this law discouraged children's sexual expression, which is important to normal growth and development. It also found that outlawing children's sexual expression and experimentation would stop children from seeking the guidance of adults about sex, making it more difficult for children to make healthy, responsible choices. It also lowered the possibility that children will report sexual violence such as **rape** and **sexual assault** for fear that they would be prosecuted of a crime themselves. As a result, the Constitutional Court found that the law was an **unconstitutional** violation of children's rights and that it could not continue to apply.

The judgment: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35

Children at School

Corporal Punishment at School

If your teacher is hitting you as a form of punishment at school, you can report them to the South African Council of Educators (SACE) who will investigate your case. Your parents or guardian may be the best person to help you do that. To find out what you need to do to lay your complaint, you can phone the SACE Call Centre: 012 663 9517 / 086 1007 223.

The Basic Education Law Act (BELA), signed into law on 13 September 2024, aims to improve South Africa's education system by promoting fairness and supporting learners' well-being. Corporal punishment means "any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child." This can include hitting, kicking, forcing children to stay in uncomfortable positions, humiliating, threatening, and can include other inappropriate actions towards children. If a teacher does this, they may be subject to fines or imprisonment.

SACE also has a duty to protect the best interests of the child. In the matter, Centre for Child Law (CCL) and Others v. SACE, the Supreme Court of Appeal upheld the best interests of the child in corporal punishment cases. Resulting from this case, SACE has a duty to "assess the impact of the actions of educators on the children . . ." SACE has to be flexible in their sentencing policy for

teachers and cannot have rigid rules for punishing teachers – their punishment should be evaluated on a case-by-case basis. Furthermore, if it is in the child's best interest, the child can participate in the proceedings against the teacher depending on the circumstances.

Sexual Violence at School

Everyone has a right to receive a basic education and to learn in a safe and protected environment. Sexual violence at school violates this right because it makes learners uncomfortable or too afraid to attend school. The Constitution provides protections against this. If you have been sexually abused by a teacher, you should see a doctor as soon as possible. They must help you get the treatment that you need. The next step is to report your teacher to the police, who must open a docket and take down your statement of what happened. You should also report the teacher to the principal of your school, and they must then report the teacher to the Department of Basic Education. Again, it is a good idea to take someone who you trust with you to the hospital and the police station. Also look at the recommendations under "reporting rape" on p. 41.

The Department of Education immediately dismissed a school caretaker after he was found guilty of sexual assault by two minor learners in 2015. The disciplinary panel found the caretaker guilty after reviewing evidence from the learners and their mother. The education authorities including the principal were in breach of their "constitutional, statutory and common law duties to investigate cases of sexual assault and take appropriate action." This caretaker was also placed on the Child Protection Register to ensure that he will not be able to work with children in the future. The chairperson of the disciplinary inquiry, Mr Phillip Hozo, stressed the fact that schools should be a "safe haven" for learners, therefore, schools have to address the problem of sexual abuse.

Other Abuse

If you're being hurt or mistreated, it's important to talk to someone you trust, like a teacher or school counsellor. These adults are required to report what's happening to the authorities, like the Department of Social Development or the police. Once they know, the authorities will investigate and make sure you're safe. You don't have to face this alone – there are people who can help, along with special protections set out in the Constitution that prohibit any abuse of children. Remember your rights and speak up in times of need. If you are being abused at home, you can tell an adult, a teacher who you trust or your school counsellor about it. Those adults have to report your matter to the Department of Social Development or the police, who must follow up the case.

Activating Your Rights

The Children's Act, which we talked about on p. 121, says that certain grown-ups have a special duty to report the abuse, neglect or need for care of children. Some of these people include teachers, doctors, nurses and religious leaders and you can find the full list in section 110 of the Act. If you have been beaten, touched in a way that makes you feel uncomfortable, or left to look after yourself by an adult, it is a good idea to speak to an adult who you trust who can help you to get the care you need. Your school might have a counsellor whose job is to help you with any of these problems.

It can be difficult to know exactly how to report abuse, especially if you are struggling to find someone that you trust who can help you. Childline is a free telephone number that you can call free of charge if you have any problems and need help. The people who work for Childline representatives can help you get counselling, report a matter to the appropriate police or the right **government or police** department, and will support you throughout the process. The free number is 08000 55 555.

EDUCATION

Section 29(1)

Everyone has the right–

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Section 29(2)

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

Section 29(3)

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

"It can be said that there are four basic and primary things that the mass of people in a society wish for: to live in a safe environment, to be able to work and provide for themselves, to have access to good public health and to have sound educational opportunities for their children"
- Nelson R. Mandela

"Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of farmworkers can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another"

"Education is the most powerful weapon which you can use to change the world"
- Nelson R. Mandela

The Legacy of Apartheid Education and the Fight for Dignity

In order to understand why the right to a basic education is so important in our Constitution, we must look at how education was used as an instrument of oppression during apartheid. At the centre of this system was "Bantu Education," established by the Bantu Education Act of 1953. Its purpose was to provide black learners with an education designed for servitude, rather than empowerment or equality.

This philosophy was carried out under massively disproportionate funding where the state spent up to ten times more on the education of a white child than that of a black child. Aside from that, black schools were deliberately and systematically deprived of basic resources like libraries, laboratories, and even adequate classrooms and furniture. This was compounded by an inferior curriculum

designed to reinforce racial hierarchy and stifle the ambitions of black learners.

This system of deliberate educational poverty came to a head in 1976. The government's attempt to enforce Afrikaans as a primary language of instruction was one of many tipping points for years of simmering anger.

On 16 June 1976 more than 10 000 school learners gathered in Soweto to protest having to learn all their classes in Afrikaans. These learners were singing outside Phefeni Secondary School when the police arrived to disperse them. The protestors started throwing rocks at the police and the police fired teargas in return. Suddenly the police started shooting real bullets at the children, who immediately ran away. In total more than 100 people were killed that day. It's hard to know exactly how many because the government sources are not reliable. Sam Nzima took a photograph of one of the first children to be shot, Hector Pieterson, being carried away by an older boy, Mbuyisa Makhubu. We now commemorate this day as Youth Day, honouring the young people who fought not just against a language policy, but against an entire system that denied them their dignity and their future. Their struggle reminds us that the right to basic education is inextricably linked to the fight for freedom and equality.

Source: Photographer Sam Nzim

Section 29 of the Constitution is a direct response to this history, it serves as an anti-thesis to the apartheid legacy in education and ensures that never again will education be used as a tool of oppression. It affirms that every child, regardless of race or background, is entitled to a quality education that frees their potential.

Post 1994 - What is the Right to Basic Education?

Every person is guaranteed the right to basic education in South Africa. It is understood not simply as time spent in a classroom, but as an entitlement to an education of adequate quality – one that enables learners to unlock their full potential and participate meaningfully in society. This conception of education is transformative and helps to redress the injustices of the past.

Crucially, this standard of adequacy is defined by its essential content. The right, therefore, includes a core 'basket of entitlements', which the Courts have affirmed are non-negotiable. This basket includes: access to enough competent teachers, a textbook for every learner in every subject, safe and dignified school infrastructure, including proper sanitation, and adequate furniture.

This court's categorisation aligns with the "Four A's" framework, adopted by the UN Committee on Economic, Social and Cultural Rights as a measurement for the adequate provision of this right. It provides that basic education must be Available (enough schools and teachers), Accessible (physically and economically), Acceptable (relevant and good quality), and Adaptable (flexible to meet diverse needs).

In the landmark case of *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13 the Constitutional Court explained that, unlike other socio-economic rights, the right to a basic education is "unqualified" and "immediately realisable". This means the government cannot use the argument that lacks resources as an excuse for not providing it. While the state cannot fix every problem instantly, it has a proactive and immediate duty to do everything in its power to deliver a quality education to every learner.

In *Juma Musjid* the court case, the Constitutional Court went on to say:

> "It is important… to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible."

Giving effect to the right to Basic Education, the South African Schools Act 84 of 1996, as amended by the Basic Law Amendment Act 32 of 2024, ensures that schools are governed with equality and dignity. The Act provides for efficient school governance, which includes principals and educators, school governing bodies, Districts and the provincial education departments.

CASE STUDY: THE LIMPOPO TEXTBOOK CRISIS

In 2012, a crisis erupted in Limpopo. Hundreds of thousands of learners started the school year without any of the textbooks required for the new CAPS curriculum. For months, learning was brought to a standstill as learners sat in classrooms with nothing to read and teachers had no materials to teach from.

A community-based organisation called Basic Education for All (BEFA), together with the public interest law centre SECTION27, took the Department of Basic Education to court. In the case of *Minister for Basic Education and Other v Basic Education for All and Other* [2015] ZASCA it was argued that without textbooks, the constitutional right to a basic education was being violated for an entire generation of learners.

The government argued that it had done its best and that circumstances beyond its control made perfect delivery impossible. It claimed that it couldn't be held to a standard of "perfection" by delivering every book to every learner, and that budgetary constraints were a major challenge.

The Supreme Court of Appeal firmly rejected these arguments. The Court declared that textbooks are an essential, non-negotiable component of the right to basic education. It held that this right belongs to every individual learner and that if even one learner is without a textbook, their right has been violated. The judges described the Department's planning as "woeful" and ruled that a lack of budget was not a valid excuse for failing to meet a direct constitutional obligation.

This landmark judgment confirmed that the right to basic education is not an abstract promise. It is a right to the actual tools needed for learning, and every learner is entitled to have their textbooks from the first day of the school year.

The judgment: *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198

CASE STUDY: THE DEADLY COST OF POOR SANITATION

In 2014, five-year-old Michael Komape died after falling into a dilapidated pit toilet at his school in Limpopo. The structure was unsafe. His tragic death highlights the grave, life-or-death consequences of the state's failure to provide safe school infrastructure. At the time, official statistics showed that 44% of schools in South Africa still relied on pit toilets. In *Komape and Others v Minister of Basic Education*, SECTION27 representing the Komape family brought a case against the state and argued

that the lack of safe toilets is a violation of the rights to basic education, dignity, and life. This underscores that "quality education" is fundamentally linked to a safe physical environment. The Court granted the family compensation and ordered that the Limpopo Department of Education eradicate all pit latrines in the province. The Limpopo Department of Education planned to complete the eradication of pit latrines by 2023 and is making progress towards this goal.

The judgment: *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18

READ:

> 'Liyabona's life has taken a turn for the better – her poetry is recognised, and she catches the eye of the hottest guy in the school. But a terrifying incident changes everything. Can she do the right thing, and keep her romance alive?'

To read this story, *The Right Thing to Do*, by Dorothy Dyer, visit http://live.fundza.mobi/home/library/fiction-short-stories/the-right-thing-to-do/

Rights in Action: Equal Education and Minimum Norms and Standards

The above case studies show the impact of community mobilisation and advocacy for the realisation of the right to basic education. Another example of this is the work of Equal Education, a social movement made up of learners who attend schools around the country. The "Equalisers" (or members of the movement) are committed to ensuring equal access to quality education for all learners. In 2007, the **government** passed a law which said that the Minister of Basic Education has the power to create "Minimum Norms and Standards" for schools. This means that the government, acting through the Minister of Basic Education, could say what minimum level of infrastructure each school should have. These norms were to cover a wide range of issues such as classrooms, toilets and sanitation, security fences, sports fields, electricity and libraries and science laboratories.

Equal Education (EE) has worked with learners whose schools have no electricity or water, no libraries or computers and schools with no proper classrooms where learners were taught under trees.

There are currently more than 500 schools in the Eastern Cape that are not even in brick buildings:

classes take place in mud huts. The Equalisers and other EE members marched and picketed, petitioned, wrote many letters to the Minister and went door-to-door in their communities to garner support for the campaign. They even spent nights fasting and sleeping outside of Parliament, to show how badly they wanted the Norms to be created. They argued that these Norms would be central to the enjoyment of their and other learners' right to basic education.

When the Minister delayed producing a draft of the Norms, EE went to court. The Court ordered the Minister to write them. As a result of the constant pressure of EE and the Equalisers, with the support of many of their partner organisations, on 29 November 2013 the Minister finally published "The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure". The Norms detail what **government** promises to do to fix many of the problems in our schools and when they will do this by. For example, classrooms should not have more than 40 learners in them, and all schools must have a library. Schools that are built out of mud or asbestos and schools without water or sanitation have to be upgraded by the department within the next three years, and all schools must comply with the Norms by 31 December 2030.

This case study is particularly important because it shows how all people, including children, can hold the government to account through campaigns such as Equal Education's Norms and Standards campaign. This campaign and the Norms and Standards are also important because they show how everyone can be part of the process of defining our rights, in this instance, the meaning of the right to basic education.

Thinking about our rights: *Why do you think the Constitution places a stricter burden on the state when it comes to education?*

Language in Education

The legacy of Hector Peterson and the June 16 protests lives on through our Constitution that protects the right to learn in an official language where it is "reasonably practicable". If you have a school where 195 learners are home language isiZulu speakers and only 5 are Sesotho speakers, it makes sense for the

school to have its lessons in isiZulu. Schools must accommodate the language preferences of the majority of their learners.

This position finds support in case law. In the case of *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 the Constitutional Court clarified that a school's language policy cannot be used to unfairly exclude learners. It ruled that while a School Governing Body (SGB) can determine its school's language policy, the provincial education department can and must intervene to ensure that the policy serves the best interests of the broader community and does not become a barrier to accessing education, especially where other schools in the area are full. The South African Schools Act states that the SGB must consider the following when drafting language policies: a) the best interests of the child, with emphasis on equality as provided for in section 9 of the Constitution and equity; (b) the changing number of learners who speak the language of learning and teaching at the public school; (c) the need for effective use of classroom space and resources of the public school; and (d) the language needs, in general, of the broader community in the education district in which the public school is situated.

Education for Learners with Disabilities

The 2024 General Household Survey found that 7.8% of learners aged between 7 and 18 reported not being able to attend school because of disability or illness. This points to a devastating reality: about 600,000 children with disabilities in South Africa do not go to school at all, this figure has more than doubled since 2001. In regard to enrolment, it is estimated that 121,500 learners with disabilities are enrolled in mainstream schools, while 119,500 attend special needs schools. While this enrolment is positive, 11,500 children remain on long waiting lists for special schools, with some remaining on these lists until they exceed the enrolment age and are subsequently removed. Learners with disabilities face a number of challenges, including the inadequate training of teachers, the lack of professional and non-professional support, the lack of parent/caregiver/guardian involvement and support, and inadequate resources. While such deficiencies are unfortunately common across the board in the education sector, they are disproportionately felt by children with disabilities who need special accommodations to be able to learn on equal basis with all other children. Furthermore, the increased weight of service deficiencies is compounded by the state's lack of attentiveness in upholding the rights of children with disabilities as compared with children without disabilities.

This situation persists despite a strong legal framework designed to protect these learners. The right to education for children with disabilities is not a secondary consideration; it's a constitutional imperative.

The failure to provide education to children with disabilities amounts to unfair discrimination in terms of section 9 of the Constitution. In addition, leaving children in poorly equipped schools or without access to education is a violation of their fundamental right to human dignity. The state has a positive duty to provide education to all children, which includes children living with disabilities. It is important to note that in 2024, learners with special needs produced a national pass rate of 89.1%. This illustrates the positive results that children living with disabilities can produce when placed in environments that cater for their needs.

CASE STUDY: EDUCATION FOR CHILDREN WITH INTELLECTUAL DISABILITIES

In the Western Cape Forum for Intellectual Disability case, the High Court dealt with the government's exclusion of children with severe and profound intellectual disabilities from the education system. The government argued it lacked the resources and that these children could not benefit from education. The Court strongly rejected this argument, stating that it was a violation of the children's rights to education, equality, and dignity. It ordered the province to provide adequate funding and create a plan to ensure every child, regardless of the severity of their disability, has access to an appropriate basic education.

The judgment: *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* [2010] ZAWCHC 544

CASE STUDY: ADVOCACY FOR THE RIGHTS OF CHILDREN WITH DISABILITIES

In early 2013 there were more than 800 children living in Orange Farm, south of Johannesburg, who had never been to school. The reason for this was that each of these children had some form of disability and schools were unwilling to accept these children. Some of the mothers of these children were certain that their children had a right to education that was not dependent on their being able-bodied. The group started looking for other children experiencing the same problem and notified the Department of Education about each one of them to show how many children were affected. They wrote letters, spoke publicly at community meetings, and voiced their opinions. In early 2013, a Task Team for Orange Farm Children with Special Education Needs was established by the Department.

The outcome of this Task Team was that the government promised to build a new school specially catering for children with disabilities in Orange Farm.

Further Education

Everyone also has the right to further education after they have completed school. However, the government has a different obligation in this regard as the right to further education (e.g., universities and colleges) must be "progressively realised". This means the government must take reasonable legislative and other measures, within its available resources, to make it increasingly accessible over time. The primary government measure for this is the National Student Financial Aid Scheme (NSFAS). The high cost of fees remains a significant barrier, and unlike basic education, there is no automatic right to fee-free university education.

The tension between the constitutional goal of access and the reality of high costs came to a head in late 2015 with the **#FeesMustFall** movement. The student-led protests were sparked by proposed fee hikes at universities and quickly grew into a nationwide campaign. From the initial call for a zero-per cent fee increase, the movement grew to a more profound demand for free, decolonised, and quality higher education. In essence, #FeesMustFall was a powerful public challenge to the pace and sufficiency of the government's "progressive realisation." Students argued that the state's definition of "available resources" needed to be radically re-examined and that current policies and structures like NSFAS were inadequate for a generation that was confronted with significant financial obstacles. The demonstrations were successful in halting fee increases for the 2016 academic year and forced the issue of higher education funding to the centre of the national political agenda.

Education Statistics (These statistics are based on the matric class of 2024.

For 100 learners who were in school ten years earlier, as part of a Grade 2 class:

≈ 44 learners dropped out of school before matric

≈ 56 learners wrote their matric exams in 2024

≈ 50 learners passed matric

≈ 6 learners failed matric

ENVIRONMENT

Section 24. Everyone has the right—

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

> ***(i) prevent pollution and ecological degradation;***
>
> ***(ii) promote conservation; and***
>
> ***(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.***

The Environment, Our Society and the Constitution

Your living environment should not be harmful to your health or wellbeing. It should not be physically dangerous to you or make you sick. So, something that is harmful to your wellbeing could be something that causes distress or discomfort to your health. For example, living next to a factory that produces smelly fumes and makes a lot of noise would result in harm to your wellbeing. Some of the common aspects of a healthy environment include access to clean drinking water (linked to your rights under section 27), and not living in a place that is heavily polluted.

The **Constitution** places an **obligation** on the state to create **legislation** and take other measures to protect the environment for us, our children and for future generations. Farming, mining and managing human waste are all activities that are required for society currently, but if we are not careful all these things can destroy the natural environment. There are specific laws, including the National Environmental Management Act, which lists companies' responsibilities to protect the natural environment when they engage in industrial activities.

The Constitution also obliges the government to ensure that the animals that share our country with us have a place to live and are not harmed or mistreated.

Environmental rights are also related to other rights, because everyone relies on the environment to

be able to live a healthy life. For example, if you live in a community near a mine, if the mining waste gets into your drinking water – part of the environment – it can make you sick.

This right also protects the environment for the benefit of our children and our children's children: If we do not take care of our environment now, future generations will not be able to enjoy it. Humans have managed to change the way that we live very dramatically. We now have cars, cities full of lights and big factories.

The problem with this development is that it produces a lot of pollution which enters our atmosphere and the air surrounding the earth. Over the past 100 years, industry and agriculture have put many gases into the atmosphere, and the earth has not been able to adapt to the increasing change. Because of these gases are trapped in the atmosphere and the earth is warming up faster.

Globally, environmental destruction has led to rising temperatures, higher sea levels, and severe ecosystem disruptions. This is called climate change. In South Africa, black low-income communities are often on the front lines of these crises. Similarly, indigenous communities worldwide face the risk of displacement due to environmental degradation, further separating families and communities.

Climate change continues to outpace policy implementation, and existing regulations are often undermined by corporations that resist compliance.

Climate change means that the sea is getting warmer, and weather patterns are changing. Different people will feel the impact of climate change differently, depending on where they live. Some of the impacts of climate change include food shortages, flooding and droughts.

In South Africa, the main industry that contributes to climate change is burning coal to make electricity. The Constitution requires our government to address this problem and to think alternative ways to produce electricity, including using the sun and using wind.

To read this story, *Acid Minds*, by Nicole Levin, also available in isiXhosa as *Ilingqondo ezinomhlwa*, and other stories about the Bill of Rights, visit http://live.fundza.mobi/home/library/fiction-short-stories/acid-minds/

CASE STUDY: DEADLY AIR

The Highveld Priority Area is situated mostly in Mpumalanga and is an area with very poor air quality because of power generation, mining, and industrial and residential fuel burning. The environmental

rights organisations groundWork and the Vukani Environmental Justice Alliance Movement in Action brought a complaint to the High Court because the Minister of Environmental Affairs had not enforced a specific plan to remediate Highveld air pollution levels. As such, the state's failure to enforce the plan had negative health impacts and was a clear violation of section 24 of the Constitution. The High Court found that the Minister of Environmental Affairs failed to uphold the right to a safe environment for community members in the Highveld Priority Area and government appealed the decision to the Supreme Court of Appeal. In April 2025, the Supreme Court of Appeal ruled that the government's delay in implementing air quality regulations for the polluted Highveld was unconstitutional, upholding the right to a healthy environment and mandating that regulations be finalized within 12 months.

The judgment: *Minister of Environmental Affairs v Trustees for the time being of Groundwork Trust and Others* [2025] ZASCA 43

CASE STUDY: CANCEL COAL

South Africa generates most of its electricity through the burning of coal. This method of electricity generation is disastrous for the environment and for the health of the people who mine the coal or live or work near coal-fired power stations. Despite this, government decided to expand coal-fired power as an electricity source. The African Climate Alliance and others brought a complaint against the Minister of Resources and Energy and the National Energy Regulator of South Africa (NERSA) and other government agencies to challenge the legality of this plan. They did so on the basis that it would have a negative impact on the rights of children and future generations under sections 24 and 28. Section 24 is directly implicated due to the damaging effects of coal-fired energy on the environment and human health and section 28 is implicated due to the fact that children's health would also be impacted negatively by the expansion of coal-fired power.

The High Court declared the plan to expand coal fired power as an electricity source unlawful because the respondents had not adequately considered the plan's impact on health (particularly of children) and the environment; and because insufficient consultation had taken place. Government has indicated its intention to appeal the High Court judgment to the Supreme Court of Appeal.

The judgment: *African Climate Alliance and Others v Minister of Mineral Resources and Energy and Others* [2024] ZAGPPHC 1271

CASE STUDY: ACCESS TO ENVIRONMENTAL REPORTS

The Vaal Environmental Justice Alliance (VEJA) is a group of NGOs and community organisations living in an area Steel Valley near Johannesburg, whose homes and health were affected by pollution coming from the steelworks nearby. The pollution was so bad that the water became poisonous, and plants died. Those who could afford to move chose to leave the area, but those who could not decided to do something to save their environment and protect their health. As we saw on page 148, we have a right to a safe and healthy environment, and the VEJA knew this.

One of the steel-making companies, ArcelorMittal South Africa (AMSA) had a report about how they were going to start rehabilitating the area which included information about how much pollution they had created. However, they refused to give the full report to the VEJA. The VEJA was assisted by the Centre for Environmental Rights (CER) in making a request for the report according to the rules in PAIA. They argued that the public had an interest in knowing how bad the damage to the environment was so that they could do something about having it protected in the future. AMSA refused to give access to the report, and the case went to the Supreme Court of Appeal.

The Supreme Court of Appeal said that big mining and industrial companies must consult in good faith with the communities that they work in. It stated that there was "no room for secrecy" in a situation like this one. This case is also a good example of the way that rights work together: often your right to access information is necessary before you can show that your right to a healthy environment has been affected.

The judgment: *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* [2014] ZASCA 184

HOW GOVERNMENT WORKS

04

HOW GOVERNMENT WORKS

We often speak about the "state" or the "**government**" without thinking about exactly what it is we are referring to. The first thing to know is that the government is very big. It is made up of three different "branches" – the **legislature** (parliaments, responsible for making legislation), the executive (cabinet, minister and other officials, responsible for enforcing or carrying out the laws) and the **judiciary** (the court system, responsible for interpreting the laws and for judging disputes). There are also three different "levels" or **"spheres" of government** – national, provincial and local.

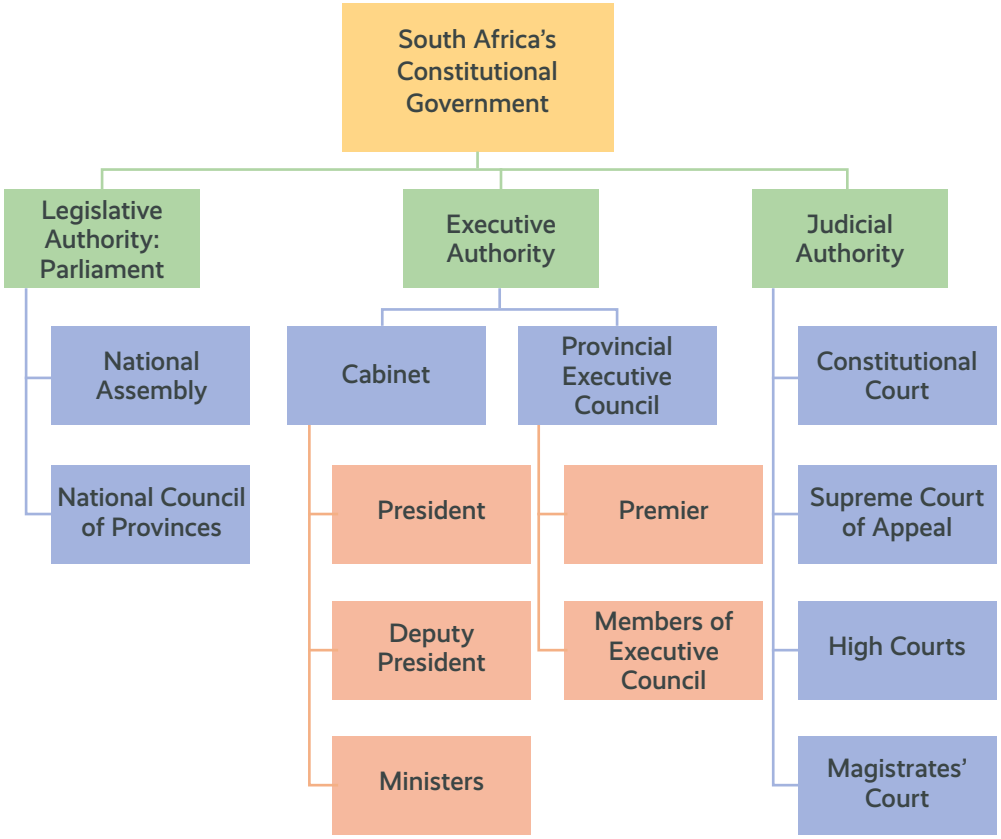


Image source: Pauw, Tanya. (2021). Catching up with the constitution: An analysis of National Health Insurance in South Africa post-apartheid. Development Southern Africa. 39. 1-14. 10.1080/0376835X.2021.1945911.

Why is the government split up like this? Though there are many answers to this question, the two most simple ones are: first, to make sure that we do not give all or most of the power to any one person (i.e. a king, queen or dictator) or group of people (i.e. a single political party or single institution); and second, because in such a big country it is impossible for one central government based, for example, in Pretoria, to understand and react to the needs of a diverse and spread out population. Since the Constitution requires that "people's needs must be responded to" and that we must be able to take part in decision-making and determination of policy and laws that impact us, we need the government to be close to us physically and also accessible to us. We will discuss both branches and spheres of government below.

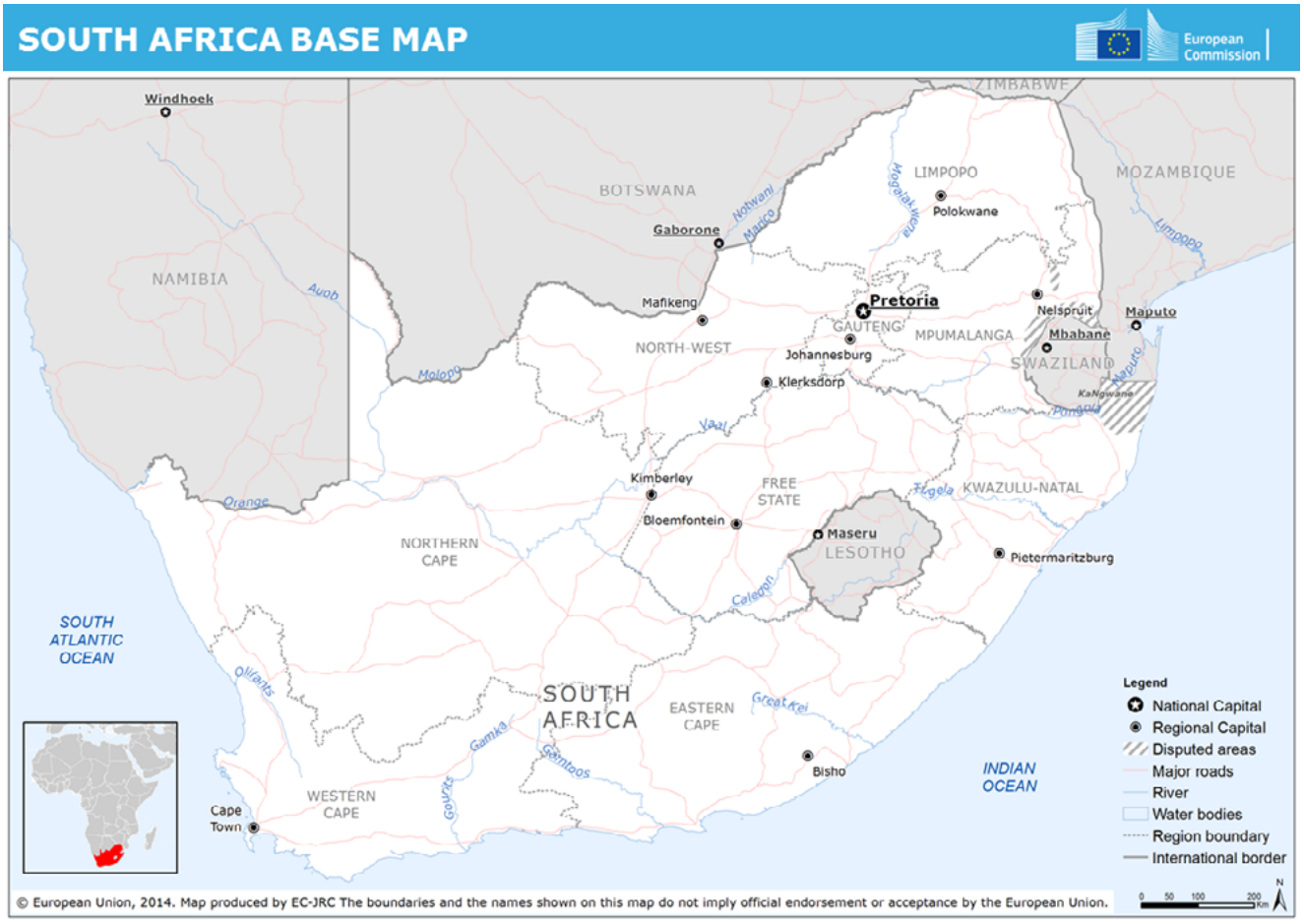
SEPARATION OF POWERS

The need to split up power is one that is captured by a concept called the "separation of powers". This idea is at the core of our Constitution and almost all modern democratic systems based on constitutions around the world. The separation of powers means that the powers and functions of government are split, or divided, into three branches. Each branch performs a different function and is independent of the other branches. This has at least two important purposes: first, it makes sure that no single branch has all the power concentrated in it; and second, it enables the different branches to keep a check on each other. The legislature, executive and judiciary all play very important roles in our democracy, and all exercise a lot of power.

Spheres of Government

The need to have the government's presence closer to a "grassroots" or community level, as we have discussed, leads to a system of government which has three spheres. We discuss this below in the section on "spheres of government". But it is not only the local government which must be accessible to us. Although not every village or town is represented by all three branches of government, our system attempts to ensure that all branches of government are as close to people as possible. For example, the country is divided into hundreds of municipalities. Your local municipality should therefore be close enough to your home for you to visit it. Each province also has a legislature or "mini-parliament" which can make laws which apply only to your province. Finally, magistrates' Courts and small claims Courts are the most accessible presence of the judiciary and are spread out

throughout the country. The independent Chapter 9 Institutions such as the Commission for Gender Equality, the Human Rights Commission and the Public Protector also have offices in each province.



Source: ERCC, European Commission https://erccportal.jrc.ec.europa.eu/ECHO-Products/Maps#/maps?pageIndex=1&pageSize=5&mt=Base%20map&c=ZAF

The Constitution takes these divisions of power very seriously and explains the limits and extent of each branch's power in detail. This is, in part, due to the fact that the **apartheid** government centralised power within the hands of a select few individuals under a system of "**parliamentary supremacy**". That system meant that Parliament had absolute and nearly unquestioned power to make laws. That meant they could pass bad laws that harmed many people and Courts could do little about it.

Laws can be good and protect people's rights, but laws can also be extremely bad, as they were during apartheid, and harm people's rights. We have some defences against this:

(1) The first defence against bad laws that protect only certain people's interests is therefore a strong Constitution that recognises many rights. We have already discussed these at some length.

(2) The second is the separation of powers between three distinct branches of government and enabling each branch to control or check the other branches' power.

(3) The third is giving representative power to three levels of government to ensure the government can always be required to hear what we say.

(4) The fourth is creating independent institutions outside of government and enabling these institutions to monitor the different levels and branches of government's use of their powers to ensure that they do not violate the rights of people in South Africa. As we will see below, South Africa has some very unique and important independent constitutional institutions such as the Public Protector, the Human Rights Commission and the Commission for Gender Equality, which are tasked with precisely this role.

It is important to remember while reading this section on how government works that these constitutional institutions, branches and spheres of government give us considerable power to ensure our rights are respected and protected. To do this however, we must ensure that they are held accountable and respond to our needs. We should also bear in mind that people's power is not limited to the use of formal institutions and channels of power created by the Constitution. As we have already seen in our discussions of rights, it is often through protest and other political action of groups of people and not through formal governmental processes alone that strides towards the achievement of social justice can be made.

The Three Branches of Government Legislature, Executive and Judiciary

The South African government is divided into three different branches: the legislature, the executive and the judiciary. All these branches derive their power and mandate from the Constitution. It explains what powers each branch has, and the principles that government officials must follow. No branch of government has any power except that granted to it by the Constitution, and any action taken by any branch of government that violates the Constitution or constitutional rights is

invalid. This is a result of the system of constitutional supremacy, which has replaced parliamentary supremacy in South Africa's constitutional democracy. As people in South Africa, we are entitled to demand actions, policies and laws from our government that are consistent with our rights and the Constitution.

The Legislature – Parliament

What is the Legislature?

The legislative branch of **government** in South Africa, based in Cape Town, is commonly referred to as "**Parliament**". It has two houses: the National Assembly and the National Council of Provinces (NCOP). The National Assembly is elected by us when we vote in the national elections every five years. Because we have a "closed list" system, we do not vote for particular members of Parliament (MP); instead, we vote for parties that create their own lists of representatives. Those whom we vote for are supposed to represent our interests in Parliament. Parliament is responsible for making laws and ensuring that the **executive** – Cabinet, the President, Minister and other officials – perform the function of **implementing** and enforcing these laws within the bounds of the Constitution.

The NCOP is made up of representatives who track the results of the elections in different provinces. It exists to ensure that interests of people, which may be specific to their province, are considered at the national level of government.

Since Parliament must deal with many different issues, it is divided into different "Portfolio Committees" which specialise in discussing issues such as health, education or access to justice. Portfolio committees are where a lot of Parliament's work takes place. Different government departments must report back to portfolio committees on the progress they have made in their work areas and the challenges that they face so that Parliament can hold the executive accountable. Portfolio committees are also at the centre of the law-making process.

How are Laws Made?

The **legislature** has the responsibility to make laws (sometimes called "statutes", "**legislation**", or just "Acts"). These laws may be initiated at the suggestion of the **executive**, by members of **Parliament** (those who are elected to represent us in Parliament) and sometimes (though rarely) by the **judiciary**. If we want Parliament to consider passing a law, they must do so as our elected representatives.

Once a **Bill** has been completed to the satisfaction of a portfolio committee, it will be presented to

Parliament for a vote. For a Bill to become an "Act of Parliament", 51% of Parliamentarians must vote in favour of the Bill becoming law. It must then also be signed into law by the President, who may refuse to do so if they think it clashes with the **Constitution**. If the President is of this opinion, they may refer the Bill back to Parliament for further consideration or to the **Constitutional Court**. An Act is a document that contains the law which must be followed by everyone in South Africa. Acts are made publicly available through publication in the Government Gazette – a publication that should be easily available to all of us.

A Siting of the South African Parliament

Source: Discott, CC BY-SA 4.0 via Wikimedia Commons

In this way, Parliament contributes to explaining, protecting and promoting our rights. Examples such as PAIA (the right to information), the Labour Relations Act (worker's rights) and the Equality Act (the rights to equality and non-discrimination) have been given in various sections throughout this handbook. These are some of the laws that the Parliament has passed.

Public Participation in the Law-Making Process

Before passing a new law, Parliament must give the public chances to learn about it and give their input. This ensures that the laws passed by Parliament are representative of the will of ordinary people in two ways. First, they are created and approved by members of political parties who are elected into power democratically. Second, the public itself can give input during the law-making process, both in portfolio committees and in special public consultations arranged by the NCOP and the National Assembly to find out what the public's opinion of the Bill is. The Constitutional Court has stated that since South Africa is a **participatory democracy,** if Parliament does not give the public a proper chance to comment on laws before they are passed, then these laws will be invalid. We, as the people of South Africa, have often used public comment sessions to express our dislike of some laws. That may sometimes stop them from becoming Acts of Parliament.

CASE STUDY: TRADITIONAL COURTS BILL

The Traditional Courts Bill was introduced to Parliament to replace **apartheid legislation** that regulated the powers of traditional leaders such as chiefs and headmen. Apartheid-era laws must be replaced so that they can be in line with the Constitution. However, the Traditional Courts Bill was very problematic. It was criticised for giving traditional leaders too much power in an undemocratic way. This situation puts the chiefs' interests above the rights of rural communities. Furthermore, the Bill did not reflect the living customary laws – which while respecting the role for traditional leaders does not give them power to override the interests of communities – and failed to protect and promote women's rights to **equality**. The Bill also did not allow people to choose not to be governed by the customary law system, and instead entrenched boundaries and restrictions set up by the a**partheid government**. During the public hearings held in **Parliament** concerning the Bill, many people spoke out against the Bill. People living in communities in which traditional leaders would have exceptional power under the law spoke up, stating that the Bill gave too much power to traditional leaders and that it failed to protect the position of women in rural communities. The National Assembly passed the Bill on to the NCOP, but the widespread unhappiness over the Bill

was noted and it was not passed, following heated discussions in the National Council of Provinces.

The Executive – Cabinet and other Executive and Administrative Officials

What is the Executive?

The function of the **executive** branch of **government** is to run the affairs of the country. It is headed by the "**Cabinet**", which consists of the President (who is elected by the National Assembly) and other senior ministers selected by the President. The Union Buildings in Pretoria are the headquarters of the executive. The **Constitution** gives duties to the President, who then divides up the work amongst their ministers and their deputy ministers. Each minister is tasked with running a certain department, for example – health, basic education or home affairs. Each department hires thousands of officials who are tasked with the daily business of the department. When you walk into your nearest home affairs office, for example, the people who speak to you are administrative officials who are the representatives of the Department of Home Affairs. The police service is another good example of an executive function. Individual police carry out these functions daily. These administrative officials form the core of what the Constitution refers to as the "public administration" and what we know as the "public service". The Constitution sets out in detail the values that must be followed by the public administration.

The **Constitution** also gives the President a variety of specific responsibilities in their capacity as President, such as deciding whether prisoners are pardoned, appointing ambassadors to other countries, and setting up commissions of inquiry.

The Implementation of Laws

Members of the **executive** may initiate or suggest laws to **Parliament** within their areas of work and expertise but more importantly, once a law is passed, it is the executive's task to ensure that it is **implemented**. This means that what the laws promise must reach all of us. To achieve this, departments will write policies, which explain what they plan to do to implement the promises made by the Constitution and laws of South Africa. Departmental policies are, therefore, very important for explaining the details of our rights. For example, when policies and laws about

hospitals are put into place, they help us understand what the practical implications are of having a right of access to healthcare services.

Representing South Africa in its Interaction with the International Community

The **executive** is responsible for representing our country consistently with the **Constitution** in our dealings with other countries, and international agencies like the United Nations and the African Union. This mandate is primarily the responsibility of the Department of International Relations and Cooperation. The department has ambassadors and diplomats posted at countries around the world to represent South Africa's interests. It also sends teams to represent South Africa at international events, and on international organisations.

CASE STUDY: UGANDA'S ANTI-HOMOSEXUALITY ACT

In May 2023, Uganda's government passed the Anti-Homosexuality Act 6 of 2023. This law introduced extreme criminal penalties for consensual same-sex relationships and granted authorities broad powers to target anyone who supports Lesbian, Gay, Bisexual, and Transgender (LGBT) rights. In South Africa, it would not be possible to pass this law, as it violates the rights to equality and dignity. This law would also violate the right to non-discrimination on the grounds of sexual orientation. As a result, many countries condemned the Ugandan government for passing this law because it is discriminatory. Despite this, South African government officials refused to put public pressure on the Ugandan government to respect the human rights of LGBTQIA+ people. Many activists and political parties criticised South Africa for its failure to stand up for the position our Constitution takes on the rights of LGBTQIA+ people in South Africa, and throughout the world.

CASE STUDY: SOUTH AFRICA'S CASE AGAINST ISRAEL IN THE ICJ

On 29 December 2023, South Africa brought a case before the International Court of Justice regarding Israel's conduct in Gaza. South Africa alleged that Israel had committed and was committing genocide in Gaza, in contravention of the Genocide Convention. South Africa requested that the ICJ indicate

provisional measures of protection. The Court ruled that it was plausible that Israel's acts could amount to genocide, and issued provisional measures. Following a second request for provisional measures, on 28 March 2024 the ICJ ordered new emergency measures including ordering Israel to ensure basic food supplies to Gaza without delay.

South Africa brought the case due to its obligation to prevent genocide under the Genocide Convention, that both South Africa and Israel signed and ratified without reservation.

Thinking about our rights: *Do you think the Constitution requires the South African government to oppose the violation of the rights that are contained in the South African Constitution even if they happen in other countries?*

Public Participation in Executive Decision-Making

Importantly, just as is the case with the law-making process, the Constitution specifically requires that "the public must be encouraged to participate in policy-making". **Government** departments must, therefore, meaningfully consult the public when forming its policy. This is true, not only of decisions made by the national executive – led by the Cabinet – but also those tasked with implementing policy at a provincial and local level.

Although these policies are easier for the departments to make and change than laws, the public should still be consulted on their contents. Government departments are still accountable to us to do what they promise to do in these policies. This is because when the executive provides services and makes decisions, the Constitution contains a number of rules and standards that they must comply with. The **Constitution** contains a list of values and principles that all public administration

THE BATHO PELE PRINCIPLES

Batho Pele is a Sesotho phrase meaning "People First". It is an initiative to get Public Service committed to serving the people of South Africa and to find ways to improve service delivery. Batho Pele consists of 8 principles. The Batho Pele principles are the executives spelling out

of the principles which are set out in Section 195 of the Constitution and should be displayed clearly and visibly on the walls of all government departments such as home affairs, police stations and clinics.

1. **Consultation:** people should be consulted about what they need
2. **Service Standards:** people should know what service to expect
3. **Access:** people should have equal access to services
4. **Courtesy:** people should be treated courteously
5. **Information:** people are entitled to full, accurate information
6. **Openness and transparency:** people should know how decisions are made and departments are run
7. **Redress:** people should be offered an apology and solution when standards are not met
8. **Value for money:** all services provided should offer value for money

has to be governed by. These include the principles of efficiency, effective use of resources, fairness and transparency. As an example, you may have seen the "Batho Pele Principles" in government buildings such as clinics; these principles are rooted in our Constitution.

Activating Your Rights

It is important that the executive upholds the **Constitution**, when implementing and enforcing laws. One clear violation of the Constitution is **corruption**, which includes dishonest or fraudulent actions taken by those in power. If you become aware of corrupt activities in your community, workplace or anywhere else, there are a number of places where you can report.

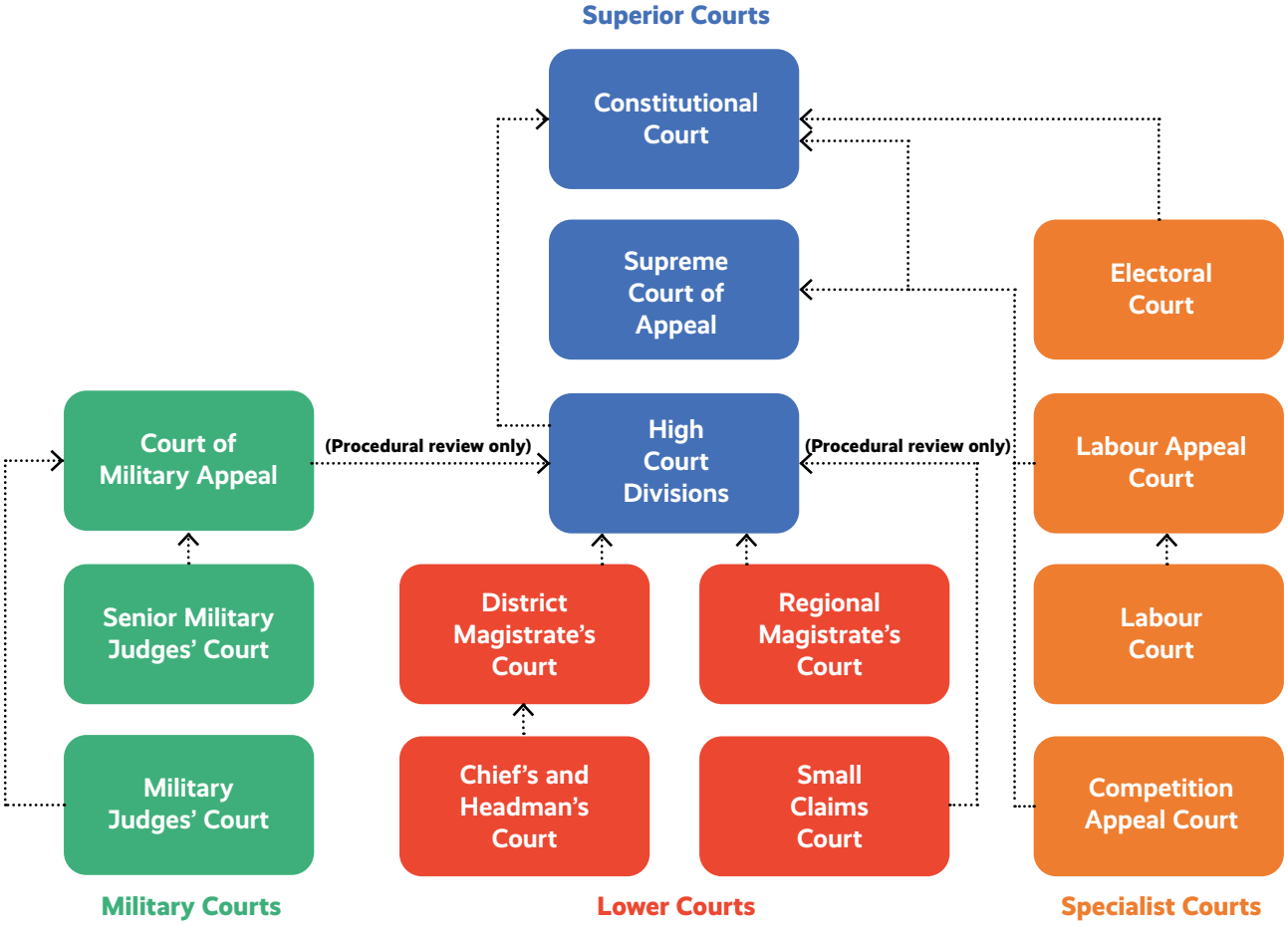
(1) You can report an incident on the Corruption Watch website (www.corruptionwatch.org.za) by clicking "Report Incident". This may be done anonymously if you wish.

(2) If you become aware of corruption in government departments or agencies and it is not linked to a criminal case, you can contact the Public Protector. You report in person as the Public Protector has offices in every province, or through their website (http://www.pprotect.org). You can also call 0800 112 040 (toll free).

(3) Cases of corruption involving a criminal offence should be reported to the South African Police Service. You can report at your local police station. Alternatively, you can make an anonymous call to CrimeStop, a toll-free hotline run by SAPS by calling 08600 1011.

(4) Cases of corruption and maladministration in the administration of state institutions and the management of public funds can be reported to the Special Investigating Unit (SIU). You can make an anonymous call to 080 003 7774, email: siu@thehotline.co.za or report on the SIU's website (www.siu.org.za).

Judiciary – The Court System



What is the Judiciary?

The **judiciary** in South Africa is an important part of the government. The **Constitution** sets up the judiciary as the guardian of our constitutional rights, and to make sure that the law made by the **legislature** and the **executive**'s actions and policies meet the standards of the Constitution. There are many different Courts in South Africa, including Magistrates' Courts, High Courts, Customary Law Courts, the Supreme Court of Appeal, and the **Constitutional Court**.

There are also "specialised" Courts focused on particular issues that are set up by specific laws. For example, there are labour Courts that decide labour law disputes, equality Courts that deal with equality and unfair discrimination disputes, and children's Courts that focus only on matters relating to children. There are also small claims Courts which deal with cases involving smaller amounts of money, and with proceedings that are easy to understand so that no legal representation is needed.

What is the Role of the Judiciary?

Judges are, according to the Constitutional Court, the guardians of the Constitution. When there is a dispute about the meaning of a law, or about whether someone is acting in a way that is in line with the law, Courts are the branch of **government** responsible for resolving them. The Constitution emphasises the importance of a **judiciary** that is independent and accountable only to the law and the Constitution. Judges are required to resolve disputes and make decisions about laws without "fear, favour or prejudice". This means that judges must approach all cases before them with an open mind, and without any favouritism to any party – whether they're a homeless learner living in a rural area or the President: everyone is equal before the law. However, this does not mean that judges should not bring their personal life experiences into their decision making: the Constitution requires that our judiciary is diverse and includes people of all genders, races and cultural backgrounds precisely because there is value in judges bridging their different life experiences into their decision making.

Judicial Review: Ensuring that All Law and Policy Meet Constitutional Standards

Each branch of **government** has no more power than is granted to them by the **Constitution** and the law. Sometimes the **legislature** will make a law, or the **executive** will take an action or make a

policy that conflicts with the Constitution or violates their rights. The Constitution gives us all the right to approach a court to decide whether the law, policy or action in question meets the standards of the Constitution. The process through which the court assesses law and policy for its consistency with the Constitution is called **judicial review**. It is an important check on both the **legislature** and the executive in terms of the separation of powers. If the court decides that those people challenging the law are correct it must "strike the law down" or "declare it invalid". This means that because the law, policy or action in question violates our rights it was not within the executive or legislature's power to enact in the first place. The law is thus **unconstitutional**.

Generally, the practical effect of a court striking down a law, policy or action with immediate effect is that from that point onwards the law, policy or action stops being a valid legal action and no longer has any power or authority. The other branches of the government must then respect this decision even if it means changing laws and policies. Laws struck down like this no longer have to be obeyed. It is important to understand that the Constitution itself gives Courts both the power and the obligation to make any decision that is "just and equitable" in the process of resolving disputes. That means that Courts can try and achieve justice in whatever way they believe is necessary to protect our rights.

> "Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order…
>
> It was, to me, never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my Government and my Office and judged against."
>
> Former President Mandela
>
> President Mandela impressively appeared as a witness, gave extensive evidence and was cross-examined in a case that dealt with his powers to appoint a commission of inquiry. This was historic, and showed his commitment to an independent judiciary and the rule of law.

Court Structures

There are over 700 Magistrates' Courts in South Africa. These are the places where most people gain access to the court system for the first time, and most civil and criminal matters are decided in these Courts. Magistrates' Courts do not have the power to deal with all legal issues. For example, Magistrates' Courts cannot strike down laws, policies or actions for being inconsistent with the Constitution. They also cannot deal with disputes about large amounts of money, and District Magistrates' Courts can't deal with divorces. Decisions of Magistrates' Courts can be taken on review or appealed to the High Court.

There are High Courts in all provinces around the country. High Courts can hear almost any matter. If you are not satisfied with a High Court decision you have the right to apply for permission to appeal it to either the Supreme Court of Appeal or the **Constitutional Court**. Generally, decisions of the High Court are appealed to the Supreme Court of Appeal before the Constitutional Court is approached.

Customary Courts decide civil and criminal matters according to customary law. Because many of the laws regulating these Courts are still from apartheid, the way that these Courts are run needs to be reformed for a constitutional era. Nevertheless, in rural areas, these Courts often offer the most accessible and important way of resolving disputes.

The **Constitutional Court** is the highest court in

THE HIERARCHY OF
SOUTH AFRICAN COURTS
CONSTITUTIONAL COURT
HIGHEST IN THE LAND [1]
SUPREME COURT OF APPEAL (SCA) [1]
HIGH COURT OF SOUTH AFRICA
(PROVINCIAL DIVISION) [9]
THE EASTERN CAPE DIVISION:
Grahamstown, Bhisho, Mthatha & Port Elizabeth
THE FREE STATE DIVISION:
Bloemfontein
THE GAUTENG DIVISION:
Pretoria & Johannesburg
THE KWAZULU-NATAL DIVISION:
Pietermartizburg & Durban
THE NORTH WEST DIVISION:
Mahikeng
THE NORTHERN CAPE DIVISION:
Kimberly
THE WESTERN CAPE DIVISION:
Cape Town
LIMPOPO DIVISION:
Polokwane & Thohyandou
MPUMALANGA DIVISION:
Nelspruit
MAGISTRATES COURTS [384]
SPECIALISED COURTS:
Labour Court, Equality Court, Land Claims Court, Water Tribunal, Tax Court, Labour Appeal Court, Competition Appeal Court, Electoral Court, Tax Court, Sexual Offences Courts, Children's Courts, Special Income Tax Courts, Community Courts

the country, and it sits with 11 judges in Johannesburg. If any other court declares an action, policy or law inconsistent with the Constitution, this decision must be confirmed by the Constitutional Court. The Constitutional Court has the power to decide any matter of significant public importance, and may hear cases directly (before they have been brought to any other court) or through an appeal process from other Courts. Usually, the Constitutional Court has indicated that it prefers to hear cases that have already been appealed to other Courts, including the High Courts and the Supreme Court of Appeal. The reason for this is that the **Constitutional Court** values the opinions of the judges at these Courts and wants to keep the system where people are at least able to appeal a decision once.

SPHERES OF GOVERNMENT: NATIONAL, PROVINCIAL AND LOCAL GOVERNMENT

South Africa is a big country made up of nine provinces, each of which is broken up into many districts. To make sure that the **government** is not too far away from us and to understand the conditions in the provinces, cities, towns and villages that we live in, the **Constitution** sets up a government not only nationally, but at provincial and local levels. Prior to 1994, the government structure was designed to centralise power and enforce racial segregation, which meant that a truly multi-level, representative government did not exist for all citizens. We could describe these as the three "levels" or "spheres" of government. Chapter 3 of the Constitution lays down the principles of co-operative government. It states that there is one central government that is divided into three spheres: national, provincial and local. Each sphere is autonomous, and all three spheres have to work together. Chapter 3 provides that the different levels of government have to work together and coordinate things such as budgets, policies and activities, particularly those that cut across all the spheres. Previously, the government was organised in such a manner that whole functions of power were allocated to one level of government, which was unwise, as other levels of government may have wanted to have a say.

All three of these levels of government have different responsibilities when it comes to different rights and policy areas. At the end of the Constitution there are lists telling us which sphere of government is responsible for what. These lists are called Schedules. Two different spheres may be responsible for the same right or issue but to a different degree. For example, healthcare service is listed as a "concurrent" provincial and national competency, meaning that provincial and national governments share the responsibility to ensure the realisation of the right of access to healthcare services.

Generally, the national government's major role is making broad national policies or norms and

standards. These policies guide provincial departments and help us to know what we can expect from provincial and municipal governments. Provincial and municipal governments are tasked with implementing these national standards and thereby ensuring the policies reach people's lives at the community level.

National government is given the power by the Constitution to take over the responsibilities of the provincial government if it is failing to meet national standards or taking action that is harmful to the country or other provinces. The national government must therefore oversee the provincial government's implementation of policies and hold provincial government accountable.

To make sure that their power is not concentrated, provincial governments are made up of all three branches of government that we discussed above. This means that each province has a legislature or Parliament of its own and an executive of its own. Each province also has at least one High Court, which acts as the highest judicial authority in the province. Provinces may even have their own Constitutions. It is important to remember however, that provincial Constitutions, laws and policies must all be consistent with the South African Constitution. If they are not, the Courts have a duty to declare them invalid.

And, because of the importance of our participatory democracy, people have the power and the voice to participate in the law-making and implementation processes in all the spheres of government: national, provincial and local.

LOCAL GOVERNMENT AND BASIC MUNICIPAL SERVICES

Section 152.

(1) The objects of local government are—

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

Section 153. A municipality must—

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes.

Chapter 7 of the Constitution creates the framework for local municipalities, granting them the right to pass by-laws, budgets, and policies for their communities, subject to national and provincial legislation.

We have the right to a local government that works, that provides basic municipal services and that promotes social justice. We also have the right to local government that is accountable and democratic.

Local (or municipal) government is made up of elected councillors, an administration made up of officials, and all the people who live in the municipality. South Africa has more than 280 separate municipalities. According to the South African Government website, there are 257 metropolitan, district and local municipalities. This number comprises eight metropolitan, 44 district and 205 local municipalities. They are focused on growing local economies and providing infrastructure and service. Local government must be responsive to the needs of the people who live in the municipality. You have a right to participate in local government and to make your voice heard, not just in local government elections but also in decisions that your councillors take which affect you. Municipal councils are elected every five years in local government elections. In order to vote in local government elections, one must actually live in the area covered by the local government or own property in the area, and they must be registered as a voter in the relevant area.

Local government has the important legal duty to deliver basic municipal services. These include water and sanitation, electricity, refuse removal (including cleaning streets), public transport and roads, and municipal health services. Local governments have the right to administer the local government matters listed in Part B of Schedule 4 to the Constitution, such as air pollution and firefighting services; and Part B of Schedule 5 of the Constitution, such as street trading; and street lighting, and any other matters referred to them by national or provincial laws. These are all important things that make our daily lives function normally. The **Bill of Rights** itself does not contain a right

to basic municipal services in so many words. But providing these services is a crucial function of every municipal **government**, to meet the basic needs of everyone who lives in South Africa. Court judgments and **legislation** (including the Local Government: Municipal Systems Act 32 of 2000, which defines the systems and procedures for day-to-day municipal operations.) have recognised that people do have a right to basic municipal services.

Looking for more information? You can find an activist's guide to *Making local government work*, a guide produced by SECTION27, the Treatment Action Campaign, the Socio-Economic Rights Institute of South Africa and Read Hope Phillips at www.seri-sa.org/images/stories/activistguidetolocalgovernment_aug11.pdf. You can also find more information about municipal reports in this report produced by the Socio-Economic Rights Institute of South Africa at http://www.seri-sa.org/index.php/research-7/research-reports.

CASE STUDY: JOSEPH AND THE RIGHT TO ELECTRICITY

In Joseph, the Constitutional Court found that municipalities have an **obligation** to provide basic services, and that everyone has a right to have these basic needs met. The Court had to decide a case concerning tenants who lived in a block of flats in Johannesburg. The tenants paid their electricity bills to their landlord, who had contracted with the government body responsible for electricity to be supplied to the building. But the landlord did not pay the government the money (even though the tenants had paid him), and so the electricity to the building was cut off. The tenants were not warned in advance or given a chance to tell their side of the story. The tenants went to court and won.

The **Constitutional Court** said that **local government** has the duty to provide basic municipal services, and the tenants had the right to receive this service and so were entitled to be told in advance that their electricity was going to be cut off.

Having access to basic municipal services is an important part of being able to enjoy our **socio-economic rights**, and of living a dignified existence. It is also part of advancing **equality** in South Africa and achieving **social justice**. The **government** is obliged to provide free basic municipal services to poor households. Different municipalities have different policies for providing free electricity, water and sanitation.

The judgment: *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30

Rights in Action: Scoail Justice Coalition and Sanitation

The right to basic municipal services includes the right to clean and safe sanitation. Using the toilet, one of the most fundamental needs that every person has, can be very dangerous in some parts of South Africa, because residents can be targets of crime when trying to relieve themselves, and because unsafe sanitation spreads illness and disease. National government estimates that over 21 million people in South Africa lack access to sufficient sanitation services.

The Social Justice Coalition is a social movement that campaigns for safe, healthy and dignified communities in South Africa's townships. It launched a Clean and Safe Sanitation Campaign to work for access to basic sanitation services in informal settlements. It has lobbied, engaged with, criticised and protested against local and provincial government to improve the delivery of sanitation. It continues to call for action on the sanitation crisis in South Africa.

CHAPTER 9 INSTITUTIONS – INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

What are Chapter 9 Institutions?

In order to help make sure that the rights in our **Constitution** become real, the Constitution sets up special constitutional institutions with specific tasks to promote, protect and monitor the rights in the **Bill of Rights**. These institutions, which are commonly referred to as "Chapter Nine Institutions" (because they are created and detailed in the ninth chapter of the Constitution) are also provided with significant powers to perform those tasks. They therefore play an important role in ensuring that the **government** performs its constitutional **obligations** and that we have access to our constitutional rights. In addition to holding the government accountable, Chapter 9 institutions also ensure that citizens, the media and businesses act consistently with the Constitution. Practical examples of the work of Chapter 9 Institutions are given below.

The Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission are all Chapter 9 institutions. Most of these institutions have national offices and provincial offices in all of South Africa's provinces.

The Constitution requires each of these institutions to be independent and answer only to the Constitution and the law. They, like Courts, must fulfil their roles independently, without fear, favour

or prejudice. Unlike Courts, Chapter 9 institutions mostly have the power to make recommendations but not orders. Nevertheless, Chapter 9 institutions are empowered to disagree with the decisions of branches of the government, where it is appropriate to do so, and no one – not even these other branches of the government – may influence their decisions. The Constitution specifically requires government branches and state entities to assist these institutions' independence and effectiveness. Each of these institutions must report on its activities at least once every year in **Parliament**. Parliament has passed laws which govern the activities of all Chapter 9 institutions to explain their powers and functions in more detail than the Constitution does. In addition, the state is required to provide Chapter 9 institutions with money to ensure that they can operate effectively, though Chapter 9 institutions commonly complain that they are not allocated sufficient budgets by the State to do their work.

The Public Protector

Section 182.

(1) The Public Protector has the power, as regulated by national legislation-

> ***(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;***
>
> ***(b) to report on that conduct; and***
>
> ***(c) to take appropriate remedial action.***

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

The Public Protector's function is to investigate and correct any **improper** and **prejudicial conduct**, maladministration and abuse of power at any level of government. The Public Protector is accountable to Parliament and must report on their activities to the National Assembly at least once a year and when they believes that it is in the public interest to do so. Between 2014 and 2024, the

Public Protector's office dealt with approximately 95000 cases. These cases have ranged from local government issues such as maladministration in municipalities to complex national matters involving executive ethics, financial mismanagement, and human rights violations. The Public Protector also plays a key role in supporting whistleblowers, promoting equality, and ensuring transparency and accountability in the public administration.

CASE STUDY: CORRUPTION IN THE POLICE SERVICE

In 2010 the Public Protector was asked to investigate allegations that the National Commissioner of the South African Police Service (SAPS) at the time was involved in corrupt conduct in the **procurement** of a R1,6 million lease for the SAPS's office space. The investigation revealed that the lease procurement process had bypassed normal competitive tender procedures, raising serious concerns about non-compliance with procurement laws and policies. In her 2011 report titled "**Against the Rules** ", the Public Protector found that the process was "unlawful, improper and amounted to maladministration." Although the Public Protector did not make a finding of criminal corruption, she held that General Cele's conduct fell short of the standard expected of public officials under the Constitution and other relevant laws.

This case underscored the requirements of section 217 of the Constitution, which provides that when an organ of state contracts for goods or services, it must do so in accordance with a system that is "fair, equitable, transparent, competitive and cost-effective."

CASE STUDY: NKANDLA

Between 2011 and 2013 members of the public lodged complaints with the Public Protector concerning the spending of state funds on former President Zuma's private home near the town of Nkandla. Responding to these complaints, the Public Protector, investigated the matter with the power given to her by section 182 of the **Constitution**, which states that the Public Protector may investigate suspected wrongdoing at any level of government.

In 2014, the Public Protector released a report, **"Secure in Comfort"** in which she found that President Zuma unduly benefited from R246 million that the state spent on upgrades to his Nkandla home. She recommended that those who were involved pay back the money spent on features of his home which had nothing to do with the President's security.

These recommendations were initially ignored, prompting political parties, the EFF and DA to approach the Constitutional Court in the *Economic Freedom Fighters v Speaker of the National Assembly and Others*; *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11. The Court ruled that the Public Protector's remedial actions are binding unless set aside by a court, and found that both the President and the National Assembly breached the Constitution by failing to comply. This landmark ruling reinforced the Public Protector's authority and confirmed that her directives are not optional.

These case studies show the power of the Public Protector to investigate allegations of corruption against very senior government officials. However, the vast majority of the cases that the Public Protector deals with involve ordinary people who cannot get copies of their identity documents or who discover corrupt activities in their municipalities, for instance. In these ordinary cases, as well as the high profile cases, the recommendations made by the Public Protector must be taken seriously by the government. Failure to do so could be interpreted as the government's unwillingness to fully implement the Constitution.

CASE STUDY: CR17 CAMPAIGN

In contrast to high-profile matters like Nkandla, where the Public Protector's jurisdiction was clear because state funds were misused, the CR17 campaign case narrowed the scope of the office's powers. The case arose from complaints about a R500,000 payment made by Bosasa/AGO and linked to President Cyril Ramaphosa's 2017 ANC leadership campaign. The Public Protector found that the President misled Parliament, failed to disclose campaign donations, and possibly engaged in money laundering. However, the Constitutional Court in the *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19 held that the CR17 campaign was a private political activity unrelated to state affairs, and therefore outside the Public Protector's constitutional and statutory mandate. The Court also found that she misinterpreted the Executive Ethics Code, lacked evidence of personal benefit, and failed to follow procedural fairness. This judgment reinforced that the Public Protector may only investigate matters directly connected to public administration or the exercise of public power, and underscored the importance of staying within the jurisdiction defined by law.

The case marked a limiting of the Public Protector's powers, clarifying that their mandate covers only matters directly linked to public administration or the exercise of public power.

Activating Your Rights

To activate your rights through the Public Protector, you must clearly link your complaint to matters within their constitutional mandate – namely improper conduct in state affairs or the public administration, including the misuse of public funds or breaches of the Executive Ethics Code by members of the executive.

Eastern Cape Health Facilities – Worsening Conditions

Ordinary citizens in the Eastern Cape lodged complaints with the Public Protector, reporting that provincial health facilities were in an alarming state of disrepair. They alleged poor sanitation, crumbling infrastructure, chronic understaffing, and a lack of essential medical supplies. Some complaints came from patients and their families, while others were from community members and healthcare workers. These complaints were submitted in writing, with supporting details such as dates, locations, photographs, and examples of how the poor conditions endangered lives.

The Public Protector investigated the allegations under section 182(1) of the Constitution and the Public Protector Act, which empowers the office to address maladministration in public administration. Site visits were conducted to assess conditions first-hand, and interviews were held with patients, staff, and officials. Documentary evidence, including budgets and maintenance reports, was reviewed to determine if there had been a breach of legal obligations and service standards.

The investigation confirmed systemic maladministration and a failure by the Eastern Cape Department of Health to maintain adequate healthcare facilities and meet constitutional obligations under section 27. The Public Protector issued a report (Report No. 11 of 2021/22) recommending urgent remedial action, including infrastructure repairs, improved staffing levels, and strengthened supply chain management to ensure availability of essential medicines and equipment. The department was directed by the Public Protector to submit implementation plans and progress reports within specified timelines.

Delayed Response to Thabo Bester Escape – DCS Improper Conduct

The investigation was triggered by complaints and media reports following the shocking escape of convicted murderer Thabo Bester from Mangaung Correctional Centre in May 2022. Initial claims suggested the inmate died in a cell fire – but subsequent evidence revealed he had escaped. A

concerned member of the public lodged a formal complaint with the Public Protector, alleging that the Department of Correctional Services (DCS) had failed to follow procedures and unduly delayed notifying law enforcement. This complaint directly implicated DCS officials, particularly concerning the failure of oversight over private contractor G4S managing the facility.

The Public Protector investigated under her constitutional mandate (section 182 of the Constitution). The investigation focused on whether the DCS complied with Standard Operating Procedures and whether there was undue delay in reporting the escape to SAPS. It examined emails, internal communications, response timelines, and testimonies from law enforcement. The investigation specifically scrutinised two officials: Chris Mahonono (MCC Controller) and Roseline Phahlane (Director Contract Management).

The Public Protector's report confirmed that DCS officials exhibited improper conduct by delaying the reporting of Bester's escape to police – first being informed in June 2022, yet only opening a police docket in January 2023

Any person, with a complaint about government services or conduct, may lodge a complaint with the Public Protector orally - whether in person, or by telephone– at any of the Public Protector's offices. For more information visit: https://www.pprotect.org/ or call the Public Protector's toll free number 0800 112 040.

The South African Human Rights Commission

Section 184.

(1) The South African Human Rights Commission must—

> ***(a) promote respect for human rights and a culture of human rights;***
>
> ***(b) promote the protection, development and attainment of human rights; and***
>
> ***(c) monitor and assess the observance of human rights in the Republic.***

The South African Human Rights Commission (SAHRC) was created in order to support South Africa's constitutional democracy. It does this by promoting respect for and protecting everyone's human rights. The SAHRC must also monitor and assess the observance of human rights in the country. The SAHRC has offices in all nine provinces and deals with approximately 10,000[1] cases each year.

The SAHRC has the power to investigate, report and make recommendations on human rights in South Africa as well as educate people about their rights. The SAHRC has extensive powers, including the power to compel a person to answer questions and produce information. The SAHRC is also empowered to join or start litigation if it is necessary to protect and advance rights.

The SAHRC is a watchdog for human rights. It can investigate when your rights are violated, push the government to fix problems, educate the public about rights, and ensure that services like housing, healthcare, and education are delivered fairly. It is independent and cannot be told what to do by the government.

Whether the SAHRC'S Remedial Directives Have Binding Authority

CASE STUDY: THE SAHRC AND AGRO DATA CASE

In September 2019, The SAHRC issued directives ordering Agro Data to restore borehole water supply, engage with occupiers on water management, and share relevant information such as scientific reports and cost data. When Agro Data failed to comply, the SAHRC went to the Mpumalanga High Court seeking a declaration that its directives were binding. The High Court dismissed the application for declaratory relief, but ordered Agro Data to provide relevant information to the occupiers for meaningful engagement, facilitated by the SAHRC.

The matter was then appealed. In the *South African Human Rights Commission v Agro Data CC & Another*, (39/2023) [2024] ZASCA 121 the main question before the Supreme Court of Appeal (SCA) was whether the SAHRC's directives are legally binding and enforceable without a court order, or whether they are merely recommendations that require court enforcement to compel compliance.

The Supreme Court of Appeal held that the SAHRC's directives are not binding or self-executing. Unlike the Public Protector – whose remedial action was found binding in the *EFF v Speaker of the National Assembly* (Nkandla) case – the SAHRC's powers are investigative and recommendatory. While the SAHRC can "take steps to secure appropriate redress", those steps must be implemented through court orders if compliance is contested. The Court emphasised that the SAHRC remains an independent Chapter 9 institution, but its enforcement role depends on judicial confirmation of its directives.

This case clarified the limits of the SAHRC's remedial powers, distinguishing them from the binding authority of the Public Protector. While it confirmed the SAHRC's important investigative role, it also underscored that securing "appropriate redress" under section 184(2)(b) requires turning to the Courts. For human rights enforcement, this means the SAHRC's impact depends on its ability and willingness to litigate where compliance is refused. The pending Constitutional Court appeal could have far-reaching implications for the enforcement powers of the SAHRC and, by extension, the protection of human rights in South Africa.

Without binding force, the Commission's ability to protect and promote human rights is largely dependent on voluntary compliance. If parties can simply ignore its remedial directives without consequence, the SAHRC risks becoming a "toothless watchdog," undermining its constitutional mandate under section 184 to secure appropriate redress.

CASE STUDY: HATE SPEECH AT SCHOOL

At a boys' school in Queenstown, Eastern Cape. a white Grade 11 learner called a black Grade 10 learner the 'k-word' while the two boys were in the school's hostel. The black learner informed his father who wrote a letter to the school informing them of the incident. The school's Code of Conduct classified this incident as a minor offence and the offending learner was given demerit points, compulsory counselling and had to apologise. The victim's father said that the school had not taken the incident seriously enough as it did not impose a strong enough punishment. As a result of this lenience, he alleged that the offender repeated his action by using the 'k-word' to refer to another learner. The father therefore made a complaint to the Human Rights Commission.

The SAHRC investigated the matter and found that the victim's father was correct in thinking that the school did not treat the matter with sufficient seriousness. The SAHRC recommended that the school change its code of conduct to allow for more serious action to be taken in such instances. The school did so, listing hate speech as a serious offence. The SAHRC also said that the school's code of conduct should list expulsion as a possibility in cases of racial misbehaviour and recommended that a sensitisation workshop on hate speech and racism, presented by the Commission, take place at the school.

CASE STUDY: EMERGENCY MEDICAL SERVICES IN THE EASTERN CAPE

In addition to investigating individual complaints of human rights abuses, the SAHRC is also empowered to investigate complaints made by entire communities. In March 2015, the SAHRC held a hearing in the Eastern Cape on emergency medical services in the entire province. Emergency medical services, including ambulances and paramedics, are a crucial part of the right to health. A complaint had been lodged with the SAHRC that the provincial department of health was failing to realise the right of access to health services in the Eastern Cape. Residents in the province said that they had never before seen an ambulance in their areas, and that their family members had died while waiting for emergency transport.

The SAHRC launched an investigation but was not satisfied with the information and reasons provided by the department, and so decided to hold a hearing to try to understand and resolve the problems. Communities shared their stories about their struggles to get ambulances and emergency care for themselves and their loved ones. The SAHRC's report on, and recommendations from, the hearing can be found here: https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf

To contact this institution you can call 011 877 3600 or visit www.sahrc.org.za. If you would like to make a complaint you can also send an email to complaints@sahrc.org.za.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Section 185.

(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are —

(a) to promote respect for the rights of cultural, religious and linguistic communities;

(b) to promote and develop peace, friendship, humanity, tolerance and national unity

among cultural, religious and linguistic communities, on the basis of equality, non discrimination and free association; and

(c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

The CRL Commission is required by the Constitution to promote and protect the rights of the large and diverse number of cultural, religious and linguistic communities in South Africa. It aims to promote and develop peace, friendship, humanity, tolerance and national unity among and within these communities. The Constitution gives this Commission the power to monitor, investigate, research, educate and report on issues concerning cultural, religious and linguistic communities.

Thinking about our rights: *Which cultural practices in your community do you think need to be protected?*

CASE STUDY: RASTAFARIAN RELIGION AND CULTURE

In 2008 the CRL Commission decided to investigate the challenges faced by the Rastafarian community in South Africa. The Commission made a number of recommendations to **government** institutions such as the police service and Department of Education. They recommended that Rastafarian learners should be allowed to wear dreadlocks in schools. They also recommended that due to its religious significance for Rastafarians, marijuana be legalised, not as a drug, but as a holy herb for healing and incense during spiritual ceremonies. The Commission also recommended that Rastafarian holidays be recognised in the same way as other religious holidays are, and that Rastafarians should be allowed to take those days off from work.

Minority faiths often face systemic marginalisation when mainstream laws and policies fail to accommodate their practices. Constitutional bodies like the CRL provide a formal pathway for such communities to seek redress and policy change.

This investigation engaged the right to freedom of religion, belief, and opinion (section 15), the right to participate in cultural life (section 30), and the right of cultural, religious, and linguistic communities to enjoy and practice their beliefs collectively (section 31). Furthermore, it served an educational purpose, informing public institutions of the religious and cultural significance of certain

practices, thereby encouraging tolerance and strengthening national unity among South Africa's diverse communities.

CASE STUDY: SEVEN ANGELS MINISTRY INVESTIGATION (2016–2018)

The reports of abuse and unethical practices by the Seven Angels Ministry were brought to the CRL Commission, triggering a private investigation. Seven Angels Ministry was accused of practices including the isolation of members, requiring members to hand over all their possessions, and requiring female members to have sex with leaders.

The CRL Commission conducted an inquiry, finding evidence of exploitation and harm. Its recommendations were submitted to Parliament but were not implemented, with MPs instead suggesting a national religious consultative conference.

Despite CRL Commission findings, no direct action was taken to curb the harmful practices, underscoring the CRL Commission's lack of enforcement power.

Investigations without legislative follow-through can leave vulnerable groups unprotected, even when evidence of harm is clear.

You can contact the commission on 011 358 9100.

The Commission for Gender Equality

Section 187.

(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

The CGE was created in order to advance **gender** equality in all parts of our society. The activities of government, businesses and other organisations all fall under the CGE's responsibility to promote and protect gender equality. In order to do this the CGE must review **legislation** from a gender

perspective, commission research and make recommendations to **Parliament**. It may also investigate complaints made by members of our society and expose laws or practices which discriminate on the basis of gender.

Monitoring and Evaluating Policies and Practices

In 2013 the CGE tabled in Parliament its position paper calling for the full decriminalisation of sex work, to protect and ensure the attainment of constitutional, labour and health rights of sex workers. The process began in response to mounting evidence of systemic abuse and rights violations experienced by sex workers – ranging from police harassment and arbitrary arrest to denial of healthcare services. The CGE was further guided by findings from the Global Commission on HIV and the Law and local research highlighting that criminalisation not only perpetuated gender-based violence but also undermined public health efforts to combat HIV.

The CGE's intervention activated the constitutional rights of sex workers by translating their lived experiences into formal advocacy and policy recommendations. This use of investigative and advisory powers demonstrated how the CGE can proactively address systemic discrimination, even in areas marked by social stigma, to advance gender equality in line with its constitutional mandate.

CASE STUDY: INTERVENTIONS IN CHILD MARRIAGE / UKUTHWALA CASES

The CGE has intervened in several cases involving the abduction and forced marriage of underage girls, a practice known as ukuthwala. Notable cases include the *Mvumeleni Jezile* matter, where a 32-year-old man abducted and repeatedly raped a 14-year-old girl from Engcobo. The CGE acted as amicus curiae in his trial, and Jezile was convicted in 2011 in the Wynberg Regional Court on counts of rape, human trafficking, and assault, receiving an effective 22-year sentence. In KwaZulu-Natal, the CGE directly intervened in a case where a girl was abducted, securing her safe return with assistance from the NPA, HAWKS, SAPS, and Social Development. In 2018, in a case in Idutywa, the CGE exposed the abduction of a 14-year-old girl and the involvement of nine accomplices, leading to multiple arrests and ongoing monitoring of the matter.

The CGE's intervention in cases of child and forced marriage is vital to ensuring that constitutional and international human rights protections are not left unenforced. Its mandate bridges the gap

between legal guarantees and practical justice by initiating investigations, compelling state action, and providing victims with a trusted, independent avenue for redress

Thinking about our rights: *Which strategies do you think the Commission for Gender Equality could adopt in order to encourage gender equality in South Africa?*

You can report gender discrimination & abuse by calling 0800 007 709.

The Auditor-General

Section 188.

(1) The Auditor -General must audit and report on the accounts, financial statements and financial management of—

> ***(a) all national and provincial state departments and administrations;***
>
> ***(b) all municipalities; and***
>
> ***(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.***

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

> ***(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or***
>
> ***(b) any institution that is authorised in terms of any law to receive money for a public purpose.***

The Auditor-General is the highest **auditing** institution of South Africa. This means that by law it has to audit and report on how the **government** is spending the South African tax payers' money. It produces annual audit reports for all government departments, public entities, municipalities and public institutions. The purpose of these reports is to check that these entities are not spending the money that they are given in a wasteful or **corrupt** manner. The Auditor-General will give government

departments either "clean" or "qualified" audits depending on the extent to which money allocated has been appropriately spent and accounted for. The Auditor-General's work involves assessing whether financial statements fairly present the facts, whether performance reporting is credible, and whether spending complies with laws such as the Public Finance Management Act (PFMA). Through its audits, the AGSA identifies unauthorised expenditure, fruitless and wasteful expenditure, and irregular expenditure, which indicate weaknesses in governance and accountability. Its expanded mandate allows it to address material irregularities – serious cases of non-compliance, fraud, theft, or breach of fiduciary duty that cause, or are likely to cause, significant financial loss or harm – by referring matters to investigative bodies, issuing recommendations with deadlines, taking binding remedial action, and, if necessary, issuing certificates of debt against responsible officials.

While the Auditor-General does not prosecute wrongdoers, it plays a critical role in promoting accountability by reporting findings to oversight bodies and the public, highlighting risks, and encouraging preventative controls and consequence management. This mandate is central to ensuring that public funds are spent lawfully, efficiently, and effectively, strengthening transparency, supporting legislative oversight, and fostering a culture of accountability across the public sector.

CASE STUDY: AGSA INVESTIGATION: NORTHERN CAPE HEALTH

The investigation at the Northern Cape Department of Health arose from a complaint lodged with the Auditor-General of South Africa (AGSA) alleging procurement irregularities and poor financial management within the department. The complaint, submitted through the AGSA's established reporting mechanisms for suspected material irregularities, outlined concerns regarding non-compliance with supply chain management processes, possible fraudulent transactions, and misuse of public funds. Upon receipt, the AGSA assessed the allegations against the threshold for material irregularities under the Public Audit Act and decided to initiate a formal investigation.

The investigation revealed that the department had indeed committed irregularities in awarding certain contracts, bypassing competitive bidding processes, and making payments without proper supporting documentation. These actions constituted non-compliance with the Public Finance Management Act and related procurement regulations, and in some cases indicated possible misconduct by senior officials. In line with its mandate, the AGSA referred specific matters to appropriate investigative and enforcement bodies for further action, issued formal recommendations to the accounting officer to address identified weaknesses, and set clear deadlines for implementing

corrective measures. Where the recommendations were not implemented satisfactorily, the AGSA exercised its power to take binding remedial action to ensure accountability.

The outcome of this case is significant in demonstrating the practical application of the AGSA's constitutional mandate to safeguard public resources. It illustrates how the AGSA can transform a citizen's or whistle-blower's complaint into concrete oversight action that not only identifies wrongdoing but also triggers accountability processes. This case also highlights the role of rights activation – members of the public exercised their right to report maladministration, thereby enabling the AGSA to act as a watchdog and ensure that public money is managed lawfully and effectively. By investigating, making its findings public, and taking enforcement steps, the AGSA reinforced the principles of transparency, consequence management, and proper governance in the public sector.

You can contact the Auditor-General by calling 012 426 8000 or by sending an email to agsa@agsa.co.za.

The Electoral Commission

Section 190.

(1) The Electoral Commission must—

> ***(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;***
>
> ***(b) ensure that those elections are free and fair; and***
>
> ***(c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.***

When an election is held in South Africa, the election is managed by the Independent Electoral Commission (IEC). The IEC's job is to ensure that elections at all levels of government happen in a manner that is free and fair. It therefore has to make sure that there is no voter fraud and that no one is intimidated into voting for a particular party. After the election the IEC must declare the results of the election to the public. The IEC also maintains a voters' role of all South African citizens who are allowed to vote in elections. Although it is publicly funded and accountable to Parliament, the IEC is independent of the government.

CASE STUDY: KHAM AND OTHERS V ELECTORAL COMMISSION (2016)

A case was lodged in 2016 by independent candidates and voters in Tlokwe Municipality, who challenged the outcome of by-elections held in the area. They alleged that the IEC had failed to comply with the Electoral Act because it did not record and provide the addresses of registered voters, which made it impossible to verify whether those voters were registered in the correct wards. They argued that this omission created a real risk of voter fraud and undermined the integrity of the elections.

The Constitutional Court interpreted the Electoral Act's requirement that the voters' roll must include sufficient information to enable the IEC to verify that voters are correctly registered in the geographic area where they reside. The Court examined evidence showing that the IEC's voters' roll for the by-elections did not contain addresses for a significant number of voters. It found that the IEC had been aware of this shortcoming for years but had failed to address it, even though the Act placed a clear duty on the Commission to maintain accurate and verifiable voter registration records.

The Court ruled that the IEC's failure to record and provide addresses for voters was unlawful and invalidated the by-election results in the affected wards. It ordered the IEC to take steps to ensure that the voters' roll complied with the Electoral Act before conducting future elections. The judgment emphasised that a voters' roll without addresses undermines the ability to detect and prevent electoral fraud, thereby compromising the constitutional standard of free and fair elections.

The case was important because it clarified the IEC's constitutional and statutory obligations to maintain a complete and accurate voters' roll, including residential address details. It reinforced that compliance with the Electoral Act is not optional and that administrative shortcomings in electoral management can directly undermine the fairness of elections. The ruling strengthened the safeguards against electoral manipulation and promoted public confidence in the electoral process.

The judgment: *Kham and Others v Electoral Commission and Another* [2015] ZACC 37

CASE STUDY: MY VOTE COUNTS

A case was lodged in 2018 by My Vote Counts NPC (MVC), a civil society organisation advocating for political transparency and accountability. MVC approached the Constitutional Court *(My Vote*

Counts NPC v Minister of Justice and Correctional Services and Another (CCT249/17) [2018] ZACC 17) to challenge the Promotion of Access to Information Act (PAIA), arguing that it failed to provide for the disclosure of information about private funding of political parties and independent candidates. MVC claimed that without such transparency, voters could not make informed political choices, and the lack of disclosure increased the risk of corruption and undue influence in the political process.

The Constitutional Court found that information about the sources of political party funding was essential for voters to meaningfully exercise their right to vote and participate in political life.

The case led to the enactment of the Political Party Funding Act 6 of 2018, which requires political parties to disclose donations above a set threshold. The IEC was designated as the body responsible for managing, monitoring, and publishing this information to the public.

This case is important because it strengthened democratic accountability by ensuring that voters have access to critical information about who funds political parties. While the matter was not initially about the IEC's core electoral functions, it expanded the Commission's mandate to include overseeing political party funding transparency. This enhances the fairness of the political process by reducing the risk of secret influence over political actors.

By bringing the matter to the Constitutional Court, MVC ensured that legislative reform would align with constitutional principles, enabling voters to make informed choices based on transparent political funding practices.

For ordinary citizens, these rulings protect the right to vote, stand for public office, and participate in a transparent democratic process. For political parties, they confirm that participation comes with strict compliance obligations, equitable treatment by the IEC, and a shared responsibility to preserve the credibility of elections.

Contact the IEC by calling 012 622 5700 or by sending an email to webmaster@elections.org.za.

IEC
SOUTH AFRICA

ACTIVATING YOUR RIGHTS

05

ACTIVATING YOUR RIGHTS

In this book, we've seen that the Constitution guarantees very powerful rights for all of us in South Africa. We've also seen that the government has the duty to protect and fulfil our rights, and that we have certain duties not to infringe each other's rights. But what happens when our rights are not respected or fulfilled? How do we use the Constitution to change our lives and our society? In this section we will offer some ideas of how to use the Constitution to activate your own rights. You can also find information on how to activate your rights throughout the handbook.

Talk Truth to Power

If you are being denied services by the government or an official, it is important to assert your rights. Taking a copy of a law that shows that you have a right to something specific and showing it to that official can strengthen your argument. Earlier in the book we talked about the fact that groups of people often can have more power than individuals. Partly, this is because it is easier for an official to think that an individual doesn't have power, but also it is because it can be intimidating to demand something from a person with more authority than you. That is why it could be a good idea to assert your rights in a group. Taking other people with you when claiming your rights will make you feel supported, and it will also show the official in question that you are organised. It may also not be enough to approach only one organisation or official for help – for example, laying a formal complaint at the place you were denied services, and reporting it to the Human Rights Commission may increase your chances of getting the help you need.

CASE STUDY: DISABLED CHILDREN'S RIGHT TO EDUCATION

Lindiwe was the mother of Mensi, a child with a **disability** that makes it difficult for him to do many things, such as go to the bathroom, by himself. Because he required extra care, the school in his neighbourhood did not want to let him enrol. Lindiwe knew that her son had a right to education, and that this right was not conditional on his being able-bodied. She had to go to court to make the principal allow Mensi to go to school. Once in school, Mensi's carer did not look after him as he was supposed to, and as a consequence Mensi's health was compromised. Lindiwe complained to the principal in person and on the phone several times, but the principal refused to make sure that the

carer did his job. Eventually Lindiwe asked some other mothers of children with disabilities to come to the school with her. The principal was so surprised at seeing this group of women demanding that a child's right to education be fulfilled, that she immediately made sure that the carer looked after Mensi and often phoned Lindiwe to assure her that her son was being looked after.

General Organisations for Legal Help

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The South African Human Rights Commission is the national institution established to entrench constitutional democracy.

Tel: +27 11 877 3600

Website: www.sahrc.org.za

Email: info@sahrc.org.za

LEGAL AID SOUTH AFRICA

Legal Aid provides professional legal advice and representation to those who cannot afford it. There are Legal Aid offices throughout South Africa. To find your closest office, phone 0800 110 110 or visit the website www.legal-aid.co.za.

SECTION27

SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. It's work focuses on access to healthcare services and basic education rights.

Tel: +27 11 356 4100

Fax: +27 11 339 4311

Email: info@section27.org.za

CENTRE FOR APPLIED LEGAL STUDIES (CALS)

CALS is a centre of the Wits School of Law that, through litigation, advocacy and research, uses the law to implement and protect human rights. Its work focuses on business and human rights, civil and political justice, environmental justice, gender justice, and home, land and rural democracy.

Tel: +27 11 717 8304

Email: matimba.hlungwani@wits.ac.za

SERI

SERI is a public interest law organisation that focuses on housing and evictions; access to basic services; and political space.

Tel: + 27 11 356 5860

Fax: + 27 11 339 5950

Emails:

- Princess Nkuna (Inquiries to the Executive Director): info@seri-sa.org
- Sihle Thabethe (Operations): sihle@seri-sa.org
- Deborah Radube (Litigation): deborah@seri-sa.org
- Lauren Royston (Research and Advocacy): lauren@seri-sa.org

LEGAL RESOURCES CENTRE

The LRC is a public interest human rights law clinic that focuses on children's rights and education, land and natural resource rights, equality and non-discrimination (including rights for people with disabilities and advancing gender equality), openness and accountability, and housing and eviction.

Tel: +27 11 038 9709/ +27 21 879 2398 / +27 31 301 7572

Email: info@lrc.org.za

PROBONO.ORG

Probono works with the private legal profession to provide pro bono legal services to people who could not otherwise obtain such services.

Tel: 011 339 6080

Fax: 086 512 2222

Email: info@probono.org.za

LAWYERS FOR HUMAN RIGHTS

Lawyers for Human Rights provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African.

Durban Office and Law Clinic: 031 301 0531

Johannesburg Office and Law Clinic: 011 339 1960

Pretoria Office: 012 320 2943

Email: info@lhr.org.za

CENTRE FOR CHILD LAW

The Centre for Child law promotes the best interests of children in South Africa through litigation, advocacy, research and education.

Tel: +27 12 420 4502

Email: centreforchildlaw@up.ac.za

LAWYERS AGAINST ABUSE (LVA)

LvA is a Public Benefit Organisation which provides pro bono urgent legal services to victims and survivors of gender-based violence, such as rape, child abuse and domestic violence.

Tel: +27 72 031 1840

Tel: +27 72 795 5528

Tel: +27 67 924 9528

Email: info@lva.org.za

CENTRE FOR ENVIRONMENTAL RIGHTS

The Centre for Environmental Rights is a law clinic based in Cape Town working on strategic litigation and advocacy in areas such as mining, pollution and climate change, corporate accountability, and activist support and training to empower communities and hold companies and the state accountable for environmental harm.

Tel: +27 21 447 1647

Email: info@cer.org.za

BLACK SASH

The Black Sash works in three areas of social protection: rights-based information, education and training; community monitoring; and advocacy in partnership.

Tel: +27 72 66 33 739

Tel: +27 21 686 6952

Email: info@blacksash.org.za

UNIVERSITY LAW CLINICS

NMMU: 041 504 1273/1199; info@mandela.ac.za

North-West University Law Clinic: 018 299 1920; Regskliniek-Potch@nwu.ac.za

Rhodes University Law Clinic: 046 603 7656; lawclinic@ru.ac.za

Stellenbosch Legal Aid Clinic: 021 808 3600 / 3696; rhkadmin@sun.ac.za/pkhoaene@sun.ac.za

UCT Law Clinic: 021 650 3775; uctlawclinic@uct.ac.za

UFS Law Clinic: 051 401 9970/1

UKZN Law Clinic: 033 260 6257 / 031 260 2446

UNISA Law Clinic: 012 429 4838; LawClinic@unisa.ac.za

University of Fort Hare Law Clinic: 043 704 7366/7520

University of Johannesburg Law Clinic: 011 559 4121/6782

University of Limpopo Law Clinic: 015 268 2506

University of Pretoria Law Clinic: 012 420 4155

University of Venda Law Clinic: 015 962 8637

University of Zululand Law Clinic: 035 902 6011

UWC Legal Aid Clinic: 021 959 3291/2756

Walter Sisulu University Law Clinic: 047 531 6075; ompondombini@gmail.com

Wits Law Clinic: 011 717 8562

EQUAL EDUCATION LAW CENTRE (EELC)

he EELC engages in strategic litigation regarding major issues surrounding long-term educational reform, as well as working on individual cases arising from experiences of learners, parents and teachers, such as expulsions, disciplinary matters and access to schools.

Tel: 0800 110 752

Website: www.eelawcentre.org.za

Email: info@eelawcentre.org.za

WOMEN'S LEGAL CENTRE

Women Legal Centre is an African Feminist Legal Centre that advances women's rights and equality through strategic litigation, advocacy and education and training.

Tel: 021 424 5660

Website: www.wlce.co.za

Email: info@wlce.co.za

NDIFUNA UKWAZI LAW CENTRE

Ndifuna Ukwazi is an activist organisation and law centre that advocates for access to well-located land and affordable housing for poor and working class families, communities and social movements.

Tel: 021 012 5094

Website: www.nu.org.za

Email: nulawcentre@nu.org.za

WE THE PEOPLE SOUTH AFRICA

Physical address

Women's Gaol, 11 Kotze Street
Braamfontein,
Johannesburg, 2017

Contact details

Email: info@wethepeoplesa.org
Tel: 010 449 2301
Web: wethepeoplesa.org

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Physical address

First Floor, South Point Corner Building,
87 De Korte Street, Braamfontein,
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Email: info@section27.org.za
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